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With the reopening of the courts it is in order to ask whether appellate courts generally cannot adopt with profit the plan of the Tennessee Supreme Court in the matter of writing opinions. The rule is in that court: "In no case is an opinion written for publication unless a majority of the judges determine that the points to be decided will add something of importance to the jurisprudence of the State." An eminent attorney of that State, in a recent address describing how its court cleared the docket, says: "The curse of lawyers is the multiplication of reports." He might have included in the anathema also editors and reporters. The great number of opinions written and reported, increasing with the years, the majority simply in affirmance of old and established principles, suggest the advisability of some change in the matter. In Tennessee, opinions are written in only twenty per cent. of the cases argued. Twenty per cent. of the cases are disposed of at the time of the argument, because all of the judges are of the opinion that the law on the point is clear, and the announcement is made at once from the bench. The decisions in sixty per cent. of the cases are oral or consist in memoranda not designed for publication. On the other hand the great majority of decisions in other States are accompanied by opinions, in most instances longer than necessary, and in many cases where no written opinion should be prepared. The time is fast coming when this reform will have to be attended to.

Those interested in municipal legislation would do well to read the admirable address of President Andrew D. White on "Government of Cities," recently delivered at Saratoga before the American Social Science Association. After referring at length to the admirable system of many European cities, he suggests as the cause of this difference between the municipalities in the old and new world, the fact that we are attempting to govern our cities upon a theory which has never been found to work practically in any part of the world. This evil theory is that the city is a political body; that its anterior affairs have to do with national politics and issues. Under the theory that a city is a political body a crowd of illiterate men "freshly raked in from Bohemian mines, or Italian robber nests, or Irish peat-bogs" may exercise virtual control. And under the idea that a city is a political body, it is to be ruled by a proletariat mob obeying national party cries and obedient to national party leaders.

Whereas, on the other hand, a city is a corporation, and has nothing whatever to do with general political interests. The questions in a city are not political questions. They have reference to the laying out of streets, the erection of buildings, sanitary arrangements, including sewerage, water supply, gas supply, electrical supply, provisions for the public health and comfort in parks, boulevards, libraries, museums, and finally in the control of franchises and the like. The work of a city, being the creation and control of the city property, it should logically be managed as a piece of property, by those who have created it, who have a title to it, or real substantial part in it, and who can therefore feel strongly their duty to it. In short, so far as possible, the business of a municipal corporation should be conducted upon the same principle observed by honest and energetic men in business affairs.

President White, however, recognizing that politics cannot be bent completely to logic, suggests that a wise view would indicate a compromise between the two theories of municipal government. To this end he would still leave in existence the theory that the city is a political body as regards the election of the mayor and the common council. He would elect the mayor by the votes of the majority of all the citizens and the common council by a majority of all the votes of all the citizens. But instead of electing them from the wards as at present, so that wards largely controlled by thieves and robbers can send thieves and robbers, and so that men who can carry their wards can control the city, he would elect a board of aldermen on a general ticket, just as the mayor is elected now, thus requiring candidates for the board

to have a city reputation. So much for the retention of the idea of the city as a political body; but now, in addition to this, in obedience to the fact that the city is a corporation, he would have those owning property in it properly recognized, and would leave to them and to them alone the election of a board of control, without the vote of which no franchise should be granted and no expenditure made. To this rule, however, one exception should be made, and that is to allow the votes of the board of control, as regards expenditures for primary education, to be overridden by a two-thirds majority of the board of aldermen. This should be done because here alone does the city policy come into direct relations with the general political system of our country. The one great argument for the existence of our public schools is that they are an absolute necessity to the existence of our republic; that without preliminary education a republic simply becomes an illiterate mob. On this ground, considering the public school system as based upon a national public necessity, expenditures in its behalf should be left, as a last resort, to the political assembly of the people.

NOTES OF RECENT DECISIONS.

DEDICATION—CEMETERY—ABANDONMENT.—In the recent case of Campbell v. City of Kansas, 13 S. W. Rep. 897, the Supreme Court of Missouri discuss a novel question as to the possibility of reverter to the original donors of land dedicated for a cemetery, and lay down the doctrine that land dedicated to a city for a cemetery, which has no longer the character and name of a grave-yard, but is used as a public park, reverts to the donor, who may recover in ejectment against the city, which in defense denies the abandonment. In such case the question will not be considered whether the land can be appropriated and used for other charitable purposes, germane to the original one, in accordance with the equitable doctrine of *cy pres*. Alexander Martin, who was special judge to decide the case, says, *inter alia*, in an exhaustive opinion:

Having reached the conclusion that the plaintiffs dedicated the exclusive use of the land in controversy to the public for the purpose of a grave-yard, it is proper next to consider whether the use thus dedicated is a perpetual one, and left no possibility of a reverter to the original donors, or their legal representatives. If it be true that the use parted with is perpetual and eternal, then it is a matter of no consequence to the plaintiffs what the public or the city of Kansas, as its representative, has done with the land; for no abuse and no abandonement could restore it to the original donors of the plaintiffs representing them. Their interest would be nothing more than the interest of any other inhabitant of the city or its vicinity to enforce the protection and preservation of the land for the uses of a grave-yard forever. If the dedication left no possibility of a reverter, then it will not be necessary to consider any other questions in the case. The literature of religion and piety has clothed trusts of the kind in controversy with attributes of perpetuity which I am satisfied cannot be sustained by science, history, or the best considered decisions of the courts. This sentiment, based on piety and common reverence, will be found expressed in the *dicta* of decisions, rather than adopted in the result of the judgments; and, even when most earnestly expressed, it is usually accompanied with qualifying phrases which make against the principle of absolute perpetuity. In Brindle v. Congregation, 33 Pa. St. 422, the judge, in rendering his opinion, says: "We hold that the ground once given for the interment of a body is appropriated forever to that body. It is not only the *domus ultima* but the *domus æterna* so far as eternal can be applied to man or terrestrial things. Nothing but the most pressing public necessity should ever cause the rest of the dead to be disturbed." All expressions declaring an eternal and perpetual use should be accepted with qualifications which arise from the nature of the subject-matter, and from necessities of the public good. No human body committed to the earth preserves forever either identity or trace of form. No monument placed above it is proof against the corroding touch of time. In the progress of the ages, both body and monument fade away. The temporary nature of the tenement we live in is more truthfully expressed in the verse of a living poet:

"The house was builded of the earth,
And shall fall again to ground."

If every portion of ground which has been made a burial place for man should be devoted in perpetuity for burial uses, the most populous and cultivated districts of the world, where millions upon millions of the human race have sunk into the earth in the countless ages of the past, would have to be abandoned as a dwelling-place or means of support to the living inhabitants of the present day. The devotion of land to any particular use must be subject to the changes and vicissitudes which time may bring to it. The use of a grave-yard is twofold—for the purpose of continuous burials, and for the purpose of preserving the remains and memory of those who have then buried. The original uses can be continued only by the public continuing to bury, or by continuing to protect the remains already buried, and to preserve the identity and memory of the persons who have left them. It can hardly be said that there is anything compulsory on the public to do this, although desecration can be prevented at the instance of any one. The public may cease to bury in the dedicated ground whenever it pleases. It may also refuse or neglect to either erect or preserve any monuments to indicate the identity of those already buried, or to give and continue to the place the character and name of a

grave-yard. When this happens the original use terminates, and the fee vests in the original donors, or their legal representatives, free from it. It would be unjust that the public should retain the use for any other purpose than the one for which it was dedicated.

There are also certain rights of sovereignty to which all land devoted to burial purposes must be subject. I allude to the right of eminent domain, and the right to pass all reasonable laws and regulations for the health and welfare of the living. A constitutional exercise of these rights may terminate the use of a grave-yard for all the purposes for which it was donated. In Kincaid's Appeal, 66 Pa. St. 411, Mr. Justice Sharswood recognized the validity of an act of the legislature which authorized the disinterment and removal of bodies from a grave-yard. He says: "We cannot doubt that it is competent for the legislature to authorize or to delegate that power [of disinterment] to the municipalities. It is a police power necessary to the public health and comfort. As they can authorize the removal of any other thing which they may deem a nuisance by a summary proceeding, without a jury trial, so they can authorize and direct the removal of dead bodies from any ground, and the consequent vacation of it as a burying ground. * * As to those recently interred, the necessity, with a view to public health and comfort, of removing them, is as apparent as the prohibition of future interments. With those which have become entirely decomposed, leaving only the bones, that necessity may not be so urgent; but of that the legislature are the exclusive judges. They may direct the removal in such manner and upon such terms as to them may seem wisest and best, having due regard to that feeling of reverence and attachment which all men naturally have to the spot where the ashes of their departed ancestors and friends repose, and the strong desire that, if possible, they should not be disturbed. Even these feeling, however, must yield to the higher consideration of the public good." In Gilbert v. Buzzard the court says: "It has been argued that the ground once given to the interment of a body is appropriated forever to that body. * * * The time must come when posthumous remains must mingle with, and compose a part of, the soil in which they have been deposited. The legal doctrine, certainly, is that the common cemetery is not *res uniue ætatis*, the exclusive property of one generation, but is likewise the common property of the living, and of generations yet unborn, and subject only to temporary appropriation." 3 Phillim. Ecc. R. 335. Language of the courts indicating the temporary nature of grave-yard uses will be found in the following cases: Windt v. German Reformed Church, 4 Sandf. Ch. 471; Partridge v. First Independent Church of Baltimore, 39 Md. 631; Page v. Symonds, 6 3 N. H. 19; Sohier v. Trinity Church, 109 Mass. 21.

An interesting question bearing on the right of reverter, and arising out of the law of charitable uses, has been suggested in the opinions of courts cited by counsel before us rather than in the points made and elaborated by them. When land is donated for a mere public use, such as highways, streets, wharves, parks, and landing places, the use of the land reverts to the donor upon discontinuance or abandonmeat of the particular use for which it was donated. This is the result according to the authorities governing the modern law of dedication. Washb. Easem. 200; Hooker v. Turnpike Co., 12 Wend. 370; Austin v. Cambridgeport Parish, 21 Pick. 223; Beardslee v. French, 7 Conn. 125; 3 Kent, Comm. (6th ed.) 448; Jacksonville v. Railway Co., 67 Ill. 543. Land may be dedicated to pious and charitable purposes, as well as for public ways, commons, and other easements in the nature of ways. Pearsall v. Poft, 20 Wend. 111. Now it seems to us that the dedication in this case falls fairly enough within the general definition of "charitable and pious purposes." Commissioners v. Church, 30 Kan. 620, 1 Pac. Rep. 109. Such uses, we know, are more often free from the incidents of reversion and resulting trusts than subject to them. We have seen that the rule "once a grave-yard always a grave-yard" cannot be maintained in the face of modern law. The question closely allied to it is whether, after the land donated for a charitable purpose, such as a grave-yard, ceases lawfully to be devoted to that use, or becomes impossible to be so devoted, must it remain with the public, or the representative of the public, subject to be appropriated and used for other charitable purposes germane to the original one for which it was donated, in accordance with the equitable doctrine of *cy pres*, which has been to some extent recognized in the decisions of this State. I do not deem it necessary to consider the general principles upon which a court of equity will determine whether the charitable intention of a donor has come to an end, or whether it may be continued in a changed or modified form, so as to cut off all rights of reversion. The courts in this country have very generally ignored or denied the existence of the doctrine of *cy pres* as bearing upon donations or dedications of land made for particular charitable uses, such as grave-yards and schools. Society v. Dugan, 5Atl. Rep. 420; Reed v. Stouffer, 56 Md. 254; Hunter v. Trustees Sandy Hill, 6 Hill, 414; Weisenberg v. Truman, 58 Cal. 70; Carter v. Portland, 4 Oreg. 348; Appeal of Gumbert (Pa.), 1 Atl. Rep. 438; Schlessinger v. Mallard (Cal.), 11 Pac. Rep. 728; Venable v. Coffman, 2 W. Va. 310; Still v. Trusts, 16 Barb. 112; Brown v. Church, 23 Pa. St. 495; Foster v. Dodd, 17 Law T. (N. S.) 614; Washb. Easem. 200; Kirk v. King, 3 Pa. St 436. In the case of Board v. Edson, 18 Ohio St. 226, it appears that land had been donated, or rather dedicated by plat, "for school purposes, and on which to erect school-houses." This donation undoubtedly fell within the classification of "charitable dedications." It was accepted and used by the public for school purposes for many years. In the course of time the land became useless for school purposes on account of the proximity of a railroad. The board of education filed a bill setting out these facts, and asking to have the lots sold, and the proceeds applied to purchase other property to be devoted to the same purpose. On a demurrer to the bill by the representatives of the original dedicators, it was dismissed. The court declared: "Should the sole uses to which property has been dedicated become impossible of execution, the property would revert to the dedicators or their representatives. Is it competent for a court of equity, without the consent of the dedicators, to extinguish forever this right of reversion by ordering a sale of the property, and assuming to execute the trust *cy vres*, by transferring it to the proceeds of the sale? We think judicial power cannot legitimately be so far extended." In the case of Rutherford v. Taylor, 38 Mo. 315, Judge Wagner seems to regard dedications of land "to any lawful use, whether public, pious, or charitable," as all alike, so far as the rights of the donor are concerned. He treats the donor's rights as resting solely on the law of estoppel *in pais*, precluding the right of the donor during continuance of the use for which it was dedicated. I may add here that the right of retention as a possible incident to this dedication does not come fairly before

us on the record of the case. No court of equity has assumed to order a sale of the land in controversy for the purpose of purchasing another grave-yard. Neither does the city assume to retain the land for the purpose of appropriating it to any kindred use with the dedication. If it be a fact that it permits it to be used as a park or place of recreation for the comfort or amusement of the living, the use could not be justified as an application of the doctrine of *cy pres*.

WATERS—RIPARIAN RIGHTS—INLAND LAKES—TRESPASS—INJUNCTION.— The recent Ohio case of Lembeck v. Nye, 24 N. E. Rep. 686, is of interest on the subject of proprietorship in inland lakes. It is there held in substance that a non-navigable inland lake is the subject of private ownership; and, where it is so owned, neither the public, nor an owner of adjacent lands, whose title extends only to the margin thereof, have a right to boat upon or take fish from its waters. Such riparian proprietor, however, is of right entitled to the use of the water therein for domestic and agricultural purposes connected with the adjacent land upon which he may reside or be engaged in cultivating; that where one who owns a tract of land that surrounds and underlies a non-navigable lake, the length of which is distinguishably greater than its breadth, conveys a parcel thereof that borders on the lake, by a description which makes the lake one of its boundaries, the presumption is that the parties do not intend that the grantor should retain the title to the land between the edge of the water and the center of the lake, and the title of the purchaser, therefore, will extend to the center thereof. If, however, the call in the description be to and thence along the margin of the lake, no such presumption arises, and the title of the purchaser will extend to the low-water mark only. Or, if the description be by metes and bounds, no reference being made therein to the lake, then only the land included within the lines as fixed by the terms used by the parties to the deed will pass to the grantee. That where numerous acts are being committed, and their continuance threatened, under a claim of right, by one person on the land of another, which acts constitute trespass, and the injury resulting from each act is or would be trifling in amount as compared with the expense of prosecuting actions at law to recover damages therefor, the owner may resort, in the first instance, to a court of equity for appropriate relief.

We regret that the able opinions of Bradbury and Spear, JJ., are too long to publish in full.

WILLS AND TESTAMENTS.

1. Introduction.
2. Personal Capacity.
3. Of Movable Property.
4. Of Immovable Property.
5. Trusts and Execution of Powers.

1. *Introduction.*—It is not the object of this essay to summarize the whole law of wills, but simply to outline those principles of international and interstate law governing or affecting the disposition of property, movable or immovable, by will; the validity of a will executed in one country of property in another; the methods of procedure to make such wills effective, and the like.

2. *Personal Capacity.*—Regarding the capacity of a person to make a will the general doctrine of the English common law, held both in the United States and England is, that testamentary capacity as to personality is governed by the law of the last domicil; as to realty, by the *lex rei sitæ*.[1] The *lex domicilii* governs as to testamentary capacity; in which is included, not only the general capacity to make a will but also the disposable power over the estate.[2]

[1] Lawrence v. Kittridge, 21 Conn. 582; s. c., 56 Am. Dec. 375; Shultz v. Dambmann, 3 Bradf. (N. Y.) 339; Cherry v. Speight, 28 Tex. 503; Westlake, Priv. Inter. L. Arts. 8 & 9; 4 Burge, Comm. on Col. & For. Law, 577; Story, Conf. L. § 465; Whart. Conf. L. §§ 296, 329, 569.

[2] Schultx v. Dambmann, 3 Bradf. (N. Y.) 379.

[3] Dupuy v. Wurtz, 63 N. Y. 556; Lawrence v. Kittridge, 21 Conn. 582; s. c., 56 Am. Dec. 385; Dannelli v. Dannelli, 4 Bush (Ky.), 61; Johnson v. Copeland, 35 Ala. 521; Abston v. Abston, 15 La. Ann. 137; Gilman v. Gilman, 52 Me. 165; Holmes v. Remsen, 4 John. Ch. (N. Y. 460); s. c., 8 Am. Dec. 581; Roberts' Will, 8 Paige Ch. (N. Y.) 319; Moultrie v. Hunt, 23 N. Y. 374; Bascom v. Albertson, 34 N. Y. 584; Knox v. Jones, 47 N. Y. 389; Suarez v. Mayor, 2 Landf. Ch. (N. Y.) 173; Swearingen v. Morris, 14 Ohio St. 424; Pretto's Will, 4 Phila. (Pa.) 386; Desesbats v. Berguier, 1 Binn. (Pa.) 336; s. c., 2 Am. Dec. 448; Flannery's Will, 24 Pa. St. 502; Carey's Appeal, 75 Pa. St. 201; Dixon v. Ramsay, 3 Cr. (U. S.) 319; Ennis v. Smith, 14 How. (U. S.) 400; Harrison v. Nixon, 9 Pet. (U. S.) 483; Kerr v. Moon, 9 9 Wheat. (U. S.) 565; Grattan v. Appleton, 3 Story C. C. 752; Potter v. Brown, 5 East, 130; Price v. Dewhurst, 4 Myl. & C. 76; s. c., 8 Sim. 279, 299, 300r Sill v. Wors-

3. *Of Movable Property.*—The validity of the execution of a will of personal property depends upon the law of the place where the testator was domiciled at the time of his death, not at the time of the execution of the will.[3] But it has been observed that it is the actual domicil, not allegiance or residence, that forms the test.[4] Dr. Warton says this view is generally accepted among modern civilians, particularly in Germany, and may now be held, so far as concerns German jurists and courts, to be a settled law.[5] Thus if by the law of the place of his original domicil, a person cannot make a will of his property before he is twenty-one years of age, he cannot make a valid will under that age even of such property as is situated in a place where the law allows persons of a different age to make a will of like property,[6] and if by the law of her original domicil a married woman cannot dispose of her property by will, except with the consent of her husband, she cannot dispose of property situated in another place where no such consent is required.[7] The law of the place of the testator's domicil governs, in relation to a will of personal property, though it be made in another State or country, where a different law prevails.[8] Thus, as to movable property in Louisiana of a non-resident testator, its disposition by will must be governed by the law of the State where the testator resided.[9] Where it appeared that a testator's domicil was in New Jersey, and his will was not executed in accordance with the laws of that State, it was held, that such will could not be regarded as a valid will of personal property in Pennsylvania.[10] And where a resident in New Jersey made a conveyance in trust, embracing real estate in New Jersey and New York, and all of his personal estate, to take effect after his death, subject to a power of revocation; and upon a contest as to the title to the property embraced in it the court held that the validity of the conveyance should be tested by the laws of New Jersey, and that, the instrument being invalid at common law, the law of New Jersey should not be presumed to be identical with that of New York.[11] A will of personal property must be executed according to the law of the testator's domicil at the time of his death, or it will not pass his personal property in a foreign country, though executed with all the formalities required by the laws of that country.[12] Leasehold property in one State owned by a resident of another State, will be deemed personal property, and as such, as to its transmission by will, will be controlled by the law of the testator's domicil.[13] It is a well settled principle in the English law regarding wills of personal property, that if they are regular, and made according to the forms and solemnities required by the law of the testator's domicil, they are sufficient to pass such movable or personal property in every other country in which situated.[14] This doctrine, though now formally

wick, 1 H. Black, 690; DeBonneval v. DeBonneval, 1 Curt. Ecc. 856; Robbins v. Dolphin, 1 Sw. & Tr. 37; Thomas Estate, 13 Phila. (Pa.) 375) Boyes e. Bedale, 1 Hem. & M. 803; Enolin v. Wylie, 10 H. L. C. 1; Laneuville v. Anderson, Sw. & Tr. 26; Yates v. Thomson, 3 Clark & Finn. 544, 570; Trotter v. Trotter, 4 Bligh (N. S.), 502; s. c., 3 Wills. & S. 407; 8 Sim. 279, 299, 300. Rights to personal property are regulated by the law of the testator's domicil, but the remedies are governed by the law of the forum. Dixon's Exrs. v. Ramsay's Exrs., 3 Cr. (U. S.) 319; Kerr v. Moon, 8 Wheat. (U. S.) 565; Ennis v. Smith, 14 How. (U. S.) 400; Atkinson v. Robbins, 5 Cr. C. C. 312.

[4] Whart. Conf. L. § 555; Bar, Priv. Inter. L. § 127, n. 22 a.

[5] Citing Wachter, Collision der Privalgesetze ii, 192, 198; Gluck; Intestates bfolge, § 42; Martin, Rchtsgulachten der Heidlberger Fakultat, B. 1 s. 175; Eichhorn, Deutsches Recht, § 35; Mittermaier, Duetsches Recht, § 32. In this connection it is well to remember what has recently been said by the editor of the American Law Review regarding Dr. Wharton's work on the Conflict of Laws, not by way of animadversion or unfriendly criticism, but in deference to the truth He says: "That celebrated author undertook an office which no legal author has the right to assume, to import into our interstate law the conceptions of continental jurists, and especially the German jurists. We have, for instance, traced in the pages of that work such conceptions as that of the German jurists that the domicile of a railroad corporation, for the purpose of procedure, consists of the central or chief points of the administration; whereas, it is well known that, under the operation of American statutes and judicial decisions, such corporations have, for the purposes of procedure, separate domiciles in every State where they maintain agencies and assume to do business." See 24 Am. L. Rev. 702.

[6] See Merlin, Repert. Stat.; *Id.* Majorite § 5; *Id.* Autorisation Maritale, § 10. The like rule is maintained by Burgundus, Stockmans D'Argentre, as to personal property and covenants. See Liverm. Dissert, pp. 34, 35, 50.

[7] *Ibid.* Henry on For. L., ¶ 1, p. 31; Story, Conf. L. § 52.

[8] Grattan v. Appleton, 3 Story C. C. 755.

[9] Lewis' Estate, 32 La. Ann. 385.

[10] Thomason's Estate, 13 Phila. (Pa.) 376.

[11] Sullivan v. Babcock, 63 How. (N. Y.) Pr. 120.

[12] Desesbats v. Berguier, 1 Binn. (Pa.) 336: s. c., 2 Am, Dec. 448; Guier v. O'Daniel, 1 Binn. (Pa.) 349 n.; Flannery's Will, 24 Pa. St. 502; Carey' Appeal, 76 Pa. St. 201.

[13] Despard v. Churchill, 53 N. Y. 192.

[14] Bruce v. Bruce, 2 Bos. & Pull. 229 n.; Potter v.

established, was for a time, much discussed in England.[15] The same doctrine is firmly established in the American courts.[16] Where a person domiciled in one State, being abroad but not having lost his domicil in his native State, executes a will of personal property in such foreign State, such will is valid, if executed according to the law of his domicil, although not executed in accordance with the law of the place where it is made.[17] Thus, a will executed in France by a citizen of New York, temporarily residing in France, is to be construed according to the law of New York.[18] And a will made while on a temporary visit in a foreign country, executed in conformity with the laws of such temporary residence, but contrary to the law of the domicil, will be invalid in the place of the domicil; and the admission of the will to probate in the place of execution, and the transmission of a copy to the place of domicil, cannot have any effect there, in the absence of some statute giving it such force.[19] Yet where a will made in one State conflicts with the prohibitory laws of the State in which the property is situated, it will be inoperative in the latter State, because it contravenes the public policy of the State as declared by its express statute, and is not embraced in the general rule of comity regarding the law of the domicil.[20]

4. *Immovable Property.*—The *lex loci rei sitæ* governs as to the capacity or incapacity of the testator to make a will of property, and as to the extent of his power to dispose of the property; and the forms and solemnities to be observed to give the will its due attestation and effect;[21] and also in all that concerns the descent and distribution of real estate.[22] A will executed in another State, and attested by a less number of witnesses than is required to give validity to a devise of lands in Florida, whose law requires three witnesses, is inoperative in Florida.[23] It has been held that if one would derive title through a Vir-

Brown, 5 East, 130; Ferraris v. Hertford, 3 Curt. 468; s. c., 7 Eng. Jur. (Apr. 1, 1843), 262; Somerville v. Somerville, 5 Ves. 750; Balfour v. Scott, 6 Brown P. C. 550; s. c., 2 Add. Ecc. 15 n.; Curling v. Thornton, 2 Add. Ecc. 1, 21; s. c., 8 Sim. 310, 311; Moore v. Darell, 4 Hagg. Ecc. 346, 362; Bremer v. Freeman, 10 Moore P. C. 358; Pipon v. Pipon, Amb. 25; Burn v. Cole, Amb. 415; Thorne v. Watkins, 2 Ves. 35; Philips v. Hunter, 2 H. Black, 402; Drummond v. Drummond, 6 Bro. P. C. 601; Hunter v. Potts, 4 T. R. 182; 4 Burge, Comm. on Col. & For. L., pt. 2, ch. pp. 388, 590; Robertson, Succ. 99, 19e, 214, 215, 285, 290, 297; Ersk. Inst. B. 3 tit. 9, § 4; Kaimes' Eq. B. 3, ch. 8, § 4. See also, Vattel B. 3, ch. 8, § 110; Denizart, Voce Domicil, §§ 3, 4; Voet, lib. 38, tit. 17, § 34; Vinnus Sebct. Quest. lib. 2, ch. 19: Van Leevrien, Cusura For. lib. 3, ch. 12; Hub. par. 1, lib. 3, tit. 13, § 20; *Id.* par. 2, lib. 1, tit. 3, § 15; Bynkershoek, Quest. Priv. Juris, lib. 1, ch. 16, 334, 335.

[15] See Bempde v. Johnston, 3 Ves. 198, 200; Brodie v. Barry, 2 Ves. & B. 127, 131; Price v. Dewhurst, 8 Sim. 279, 299, 300, s. c. 4 Myl. & Cr. 76, 80, 82; Moore v. Darell, 4 Hagg. Ecc. 346, 352; Bennett's Case, Mon. L. Mag. (Sep. 1840), 264; Sill v. Worswick, 1 H. Black. 590; Gmmaney v. Bingham, 5 Ves. 757; s. c., 3 Hagg. Ecc. 414 *n.*; Stanley v. Bernes, 3 Hagg. Ecc. 377; Hogg v. Lashley, 3 Hagg. Ecc. 415 n.

[16] Goodwin v. Jones, 3 Mass. 514; s. c., 3 Am. Dec. 273; Richards v. Dutch, 8 Mass. 506; Dawes v. Boylston, 9 Mass. 337; s. c., 6 Am. Dec. 72; Guice v. O'Daniel, 1 Binn. (Pa.) 349 n.; Grattan v. Appleton, 3 Story C. C. 755; Harvey v. Richards, 1 Mason C. C. 381; Armstrong v. Lear, 12 Wheat. (U. S.) 169; Dixon's Exrs. v. Ramsey's Exrs., 3 Cr. (U. S.) 319; Holmes v. Remsen, 4 John. Ch. (N. Y.) 460, 469; s. c., 8 Am. Dec. 581; Desesbats v. Barguier, 1 Binn. (Pa.) 336; s. c., 2 Am. Dec. 448; Rue High App., 2 Doug. (Mich.) 522.

[17] Rue High App., 2 Doug. (Mich.) 515; Caulfield v. Sullivan, 85 N. Y. 153.

[18] Caulfield v. Sullivan, 85 N. Y. 153.

[19] Morris v. Morris, 27 Miss. 847, Sturdivant v. Neill, 27 Miss. 157; Wallace v. Wallace, 2 C. E. Gr. Ch. (N. J.) 616.

[20] Mahorner v. Hooe, 9 Smed. & M, (Miss.) 247; s. c., 48 Am. Dec. 706; Harper v. Stanbrough, 2 La. Ann. 377; Harper v. Lee, 2 La. Ann. 382.

[21] Holmes v. Remsen, 4 John. Ch. (N. Y.) 460; s. c., 8 Am. Dec, 581; 20 Johns. (N. Y.) 229; 11 Am. Dec. 269; Wills v. Cowper, 2 Ohio, 124; Flannery's Will, 24 Pa. St. 502; Carey's Appeal, 75 Pa. St. 201; United States v. Crosby, 7 Cr. (U, S.) 115; McCormick v. Sullivant, 10 Wheat. (U. S.) 192, 202; Darby v. Mayer, 10 Wheat. (U. S.) 465; Copin v. Copin, 2 P. Wm. 291, 593; Curtis v. Autton, 14 Ves. 537, 541; Birtwhistle v. Vardill, 5 Barn. & Cress. 438; s. c., 9 Bligh, Henry on For. L., pt. 2, p. 576, 580; *Id.* pt. 2. ch. 4, § 5, pp. 169, 170; *Id.* pt. 2, ch. 5, p. 217; Story, Conf. L., §§ 428, 434, 474.

[22] Lucas v. Tucker, 17 Ind. 41; Dunbar v. Dunbar, 5 La. Ann. 159; Augusta Ins. Co. v. Mortoe, 3 La. Ann. 418; Harper v. Hampton, 1 Harr & J. (Md.) 622, 687; Goodwin v. Jones, 3 Mass. 514, 528; s. c., 3 Am. Dec. 173; Cutter v. Davenport, 1 Pick. (Mass.) 81, 83; Blake v. Williams, 6 Pick. (Mass.) 286; s. c., 17 Am. Dec. 372; Holmes v. Remsen, 4 John. Ch. (N. Y.) 460; s. c., 8 Am. Dec. 581; Nicholson v. Leavitt, 4 Sandf. (N. Y.) 220; Applegate v. Smith, 31 Me. 161; Chapman v. Robertson, 6 Paige Ch. (N. Y.) 627, 630; s. c., 31 Am. Dec. 264; Wills v. Cowper, 2 Ohio, 124; s. c., 3 Ohio, 124; Holman v. Hopkins, 27 Tex. 38; United States v. Crosby, 7 Cr. (U. S.) 115; Clark v. Graham, 6 Wheat. (U. S.) 577; Kerr v. Moon, 9 Wheat. (U. S.) 577; McCormick Sullivant, 10 Wheat. (U. S.) 192; Darby v. Mayer, 10 Wheat. (U. S.) 465; Ennis v. Smith, 14 How. (U. S.) 400; O'Brien v. Woody, 4 McL. C. C. 75; Sill v. Worswick, 1 H. Black. 665; Hunter v. Potts, 4 T. R. 182; Philips v. Hunter, 2 H. Black. 402; Selkrig v. Davis, 2 Rose, Bank. Cas. 97; s. c., 2 Dow. 230; Copin v. Copin, 2 P. Wm. 290, 293; Brodie v. Barry, 2 Ves. & B. 130; Birtwhistle v. Vardill, 5 Barn. & Cress. 438; s. c., 9 Bligh, 32; Elliott v. Minto, 6 Madd. 16; Cockerell v. Dickens, 3 Moore P. C. 98, 131, 132; Tulloch v. Hartley, 1 Young. & C. (N. R.) 114.

[23] Crolly v. Clark, 20 Fla. 849.

ginia will to land in the District of Columbia, he must show that the will was so executed as to pass real estate in the district. If this is not done, it is immaterial that the will was sufficient to pass the title of real estate in Virginia.[24] By a will made in Massachusetts a testator devised land in Rhode Island to his wife. Other land passed under a residuary clause. Had the will been construed according to the law of Massachusetts, the widow would have had no dower in the residue. It was held that the law of Rhode Island must prevail, the land being there situated, and that the widow was entitled to claim dower in the residue.[25] It has been held that a Scotch deed of disposition and settlement, duly executed as a testamentary disposition, according to the laws of Scotland, in the presence of two witnesses, is a valid will of the testator's real and personal property in New York.[26]

5. *Trusts and Execution of Powers.*—The validity of the trusts declared by a will is to be determined by the law of the testator's domicil.[27] A will in execution of a power must be executed in conformity to the law of the domicil of the donor of the power; the will creating the power, and the one executing it, form but a single instrument;[28] and where a testator executes a testamentary power, according to the law of his domicil, it does not relate back to a will of a prior testator domiciled elsewhere, conferring such power.[29] Thus, where a power of appointment was given to a party enabling him to dispose by will of personal property situated in one country, and such party was domiciled in another country, and he executed the power and complied with all the requisites thereof making a will according to the law of the country where the power was created and the personal estate was situated, but which will was not made in accordance with the requisites prescribed by the place of his domicil; the execution of the power was held valid.[30] Where a married woman domiciled in Maryland, having a power of appointment over real estate in Massachusetts, devised by her father, who was domiciled there, died, leaving a will devising to her husband all the real and personal estate to which she should be entitled in law or equity at the time of her decease, but making no mention of the power of appointment, which by the law of Maryland was not a good execution of the power, though it was otherwise by the law of Massachusetts; it was held that the law of the latter State must govern, and that the power was well executed.[31]

[24] Robertson v. Pickerell, 109 U. S. 668.
[25] Atkinson v. Staigg, 13 R. I. 725.
[26] Easton's Will, 6 Paige Ch. (N. Y.) 183.
[27] Wood v. Wood, 5 Paige Ch. (N. Y.) 596; S. C., 28 Am. Dec. 451; Bascom v. Albertson, 34 N. Y. 584; S. C., 1 Bedf. (N. Y.) 340; Ward v. Starr (Pa.), 11 Pitts. L. J. 155.
[28] Bingham's Estate, 1 Leg. Gaz. Rep. 31, 91.
[29] See Bingham's Appeal, 64 Pa. St. 346; Tatnall v. Hankey v. Moore, 2 Moore P. C. 342.
[30] Tatnell v. Hankey, 2 Moore P. C. 342.
[31] Sewell v. Wilmer, 132 Mass. 131.

PENDING LEGISLATION RESULTING FROM THE "ORIGINAL PACKAGE" DECISION.

The "original package" decision has given rise to much comment and discussion in the law journals and press of the country; and naturally so, by reason of its bearing upon certain questions which, having assumed a political phase, are agitating the people and the political parties.

Without attempting to criticise or to challenge the correctness of that decision from a legal standpoint, or to approve or condemn its effect upon the policy of prohibition as a political or as a moral question, my aim will be to consider briefly the decision, only so far as it has given rise to pending legislation in the congress of the United States, and only so far as the constitutionality of that legislation is concerned. Has the congress the right, under the constitution, to relegate to the States the power to regulate commerce between the States, or to giving its assent to the exercise of such power by the State? The language of the constitution is: Article 1, section 8. "The congress shall have power to regulate commerce with foreign nations, and among the several States, and among the Indian tribes."

Articles 9 and 10 of the amendments provide as follows: "The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people."

"The powers not delegated to the United States by the constitution, were prohibited by it to the States, are reserved to the States respectively, or to the people."

Mr. Hamilton in the *Federalist*, in discussing the powers of the union, says: "But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not by that act exclusively delegated to the United States. This exclusive delegation, or rather this alienation of State sovereignty, would only exist in three cases: Where the constitution in express terms granted

an exclusive authority to the union; where it granted in one instance an authority to the union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant."

It is well known that the proposed constitution, which Mr. Hamilton was discussing, the adoption or rejection of which by the States was then pending, was intended to remedy certain evils and defects found to exist in the then existing constitution, and to make the line between the powers delegated to the general government, and those reserved to the States, marked and distinct. It seems that the construction contended for by Mr. Hamilton, as to the line between the reserved and delegated powers, is expressly provided for in articles 9 and 10 of the amendments as above set out, and as an example of the third-class of exclusively delegated powers, he cites the power of congress to establish an uniform rule of naturalization. The power to establish a uniform rule is repugnant to the power to establish separate and distinct rules, and hence is a power exclusively delegated to the general government. If, as is said by Mr. Chief Justice Fuller in Leisy v. Hardin, the power of congress to regulate commerce is a unit, is national in its character and must be governed by a uniform system, it is difficult to see how, under the construction of Mr. Hamilton, that power is otherwise than an exclusively delegated power, and not one reserved by the States. If so, there is not even a concurrent power in the States to be exercised in the absence of congressional action, except where the subjects to be acted on are purely local in their nature, and to use the words of the chief justice again: "Whenever the law of the State amounts essentially to a regulation of commerce with foreign nations, or among the States * * * it comes in conflict with a power, which, in this particular, has been exclusively vested in the general government, and is, therefore, void." If, then, the power to regulate commerce has been exclusively vested in the general government by the constitution, how can that exclusive power be divested by congressional action? How can congress, which is the creature of the States under the constitution, regrant to the States the power to regulate commerce, when the States have surrendered such power and vested it exclusively in another government? Can this be done except by the States themselves consenting to change or make a new compact?

The reservation of power to the States, not delegated by them and not prohibited to them, is very different from the delegation of power to them. One of the reserved powers, and not prohibited to the States, is the power to provide within the limits of the States for the security of the lives, health and comfort of their citizens, being what is known as the police power of the States, and there is no power or authority in the general government to interfere therewith, unless it comes into conflict with a power exclusively vested in it. There is no hindrance to State action, unless such action goes to the extent of regulating commerce as an exclusively delegated power, and in such the government of the delegated power controls. The delegated power is supreme over any particular subject, the exclusive control of which is given. Hence, the reserved powers of the States and the exclusively delegated powers of the general government are separate and distinct under the constitution, and as the States cannot take from or add to their reserved powers, so it would seem to follow necessarily that the general government cannot take from or add to its delegated powers, except by a change in the constitution in both instances. The congressional legislation now pending, according to the view of some, is but a restoration to the States of a power yielded by them, and, therefore, not open to constitutional objection; but it is submitted, that when States by solemn compact have once surrendered exclusive control over any particular subject, which requires the application of a national and uniform system, it is beyond their power, even by congressional assent, to exercise any authority over that subject without entering into an equally solemn compact, agreeing to take the power out of the category of exclusive powers. This must, necessarily, be so from the nature and essence of our system, and from the rules of construction as laid down by Mr. Hamilton. If congress may restore to the States one delegated power, it may all, and the general government might become as weak and powerless as under the articles of confederation. Such a construction should be given as to remedy the evils and defects which existed under those articles, and which the framers of the present constitution intended to be remedied.

Again, the power to regulate commerce means the power to make a rule by which commerce between the States is to be governed. Congress may or may not make such a rule; if it does the law of congress controls State action; if it does not, it is left to the courts to determine what is or is not a regulation of commerce by the States. Therefore, if congress take any action whatever on the subject, it must be an active regulation by itself, not a permission only to the States to act. It must either act directly on the subject-matter of regulation, or take no action at all. Congressional legislation must mean affirmative regulation, and not negative, by permission to the States. The former is recognized by the constitution, the latter not even by implication. The federal government is one of powers delegated *by* the States, and has no element of a delegation of powers *to* the States, and in order to sustain a delegation of power to the States over any subject, the control of which has been made exclusive in the national government in the first instance the fundamental or organic law of that government must sanction such action. Congress is not attempting to exercise affirmative control over commerce between the States, but simply to pas-

sively declare its permission to the States to do that which the States themselves have agreed to vest exclusively in another authority. Notwithstanding the intimation in the "original package" case, it is submitted that if this proposed legislation should be brought before the supreme court its constitutionality would not be sustained.

J. A. CARTWRIGHT.

Nashville, Tenn.

MURDER—THREATS—CHARACTER.

STATE V. SPENDLOVE.

Supreme Court of Kansas, June 7, 1890.

In a prosecution for murder the evidence was circumstantial and did not show who was the aggressor. It was shown, however, that the deceased had several times threatened the accused, both in his presence and in his absence, and that the character of the deceased was perverse and refractory. The following instruction was requested by the defendant: "If the evidence leaves you in doubt as to what the acts of the deceased were at the time, or immediately before the killing, you may consider the threats and character of the deceased, in connection with all the other evidence, in determining who was probably the aggressor:" *Held*, that the court erred in refusing to give such instruction.

VALENTINE, J.: This was a criminal prosecution upon information in the district court of Shawnee county, in which the defendant, Joseph J. Spendlove, was charged with murder, in the first degree, in killing and murdering one Gustave Werner. The defendant was found guilty of murder in second degree, and sentenced to imprisonment in the penitentiary for the term of 21 years, and from this sentence he appeals to this court.

It appears that for nearly two months prior to March 20, 1889, the day on which Werner's death occurred, Spendlove and Werner together occupied a certain small building, numbered 716, situated on the east side of Kansas avenue, in the city of Topeka. This building belonged to Hiram Higgins, but it was leased to Werner and Spendlove. The written lease was in Werner's name. The building contained two rooms—a west or front room, and an east or back room; and the two rooms were separated by a partition, with a door opening through the partition, near the south side, from one room into the other. Werner used the back room for a tailor shop, and a part of the front room for his goods. Spendlove used the other portion of the front room for a loan office; he being engaged at the time in the business of loaning money. During the occupancy of this building by Spendlove and Werner, a difficulty arose between them which continued up to the night of March 20, 1889, between the hours of 8 and 9 o'clock, when the difficulty culminated in the death of Werner, and in the very dangerous wounding of Spendlove. Just how the death and wounding occurred is not satisfactorily shown. Spendlove and Werner at the time were the only persons in the building, and each received a pistol-shot wound. Werner was shot in the back of the head, and died almost instantly. Spendlove was shot just below the right ear; and the ball, penetrating his neck, passed forward, and towards the left side, and lodged in his left cheek-bone. Only one instrument with which the shooting could have been done was found in the building or about the premises, and that was a 38-caliber Smith & Wesson revolver. To whom this revolver belonged is not satisfactorily shown. Somewhere from three to five shots were fired—probably four or five. Several persons heard them, or a portion of them. A few persons saw Spendlove and Werner during portions of the time during which these shots were being fired. One witness, J. D. Smith, testified that he saw the pistol, about the time the first two shots were fired, in Spendlove's left hand. Spendlove, however, testified that he did not do any of the shooting, and that all the shooting that he had any remembrance of was done by Werner. But, really, as to who in fact did the shooting, or how these shots were fired—whether one did all, or whether one did a part and the other a part—the evidence is not at all harmonious or satisfactory. Immediately after the last shot was fired, the building was entered by other persons, and these other persons found Spendlove in the front room, on his hands and knees, weak and debilitated, with his head towards the front door, and his wound bleeding profusely; and they found Werner dying in the back room, in the southwest corner thereof, near the partition door, with his head to the southwest, and his feet and body extending towards the middle of the room; and they found the pistol lying between Werner's legs, near his knees. The prosecution claims that Spendlove did all the shooting, while the defense claims that it was all done by Werner; but upon any theory that all the shooting was done by one of them, the manner in which the wounding of the other was effected is not satisfactorily accounted for or explained. Indeed, it is not explained at all. * * *

This leaves only the question whether the court below committed material error or not in refusing to give the seventh instruction requested by the defendant. That instruction reads as follows: "If the evidence leaves you in doubt as to what the acts of the decease were at the time, or immediately before the killing, you may consider the threats and character of the deceased, in connection with all the other evidence, in determining who was probably the aggressor."

No instruction in lieu of this, or similar to it was given by the court. Among the evidence, including that with reference to the facts already mentioned, tending to render this instruction applicable and of importance, is the following: Spendlove testified that he did not do any of the shooting, that he did not have the pistol in his

hand, that he did not have any pistol on or about the premises, and that he did not own the pistol with which the shooting was done; and there was but little except circumstantial evidence that tended to contradict Spendlove testimony. R. L. Johnson testified that, about a week before the shooting, he saw a revolver upon a shelf in the back room of the building where the shooting was done, and that Werner said it belonged to him, and that about that time Werner said "he would have Spendlove out of there before that time [before 20 or 30 days], or he would cut his damned throat." W. O. Ewing testified that he he heard Werner say to Spendlove about March 15, 1889, "Get out, or I will throw you out," and that Werner seemed to be quite angry at the time. Jacob H. Hartman testified that about this same time he saw Werner go into the back room, and get a "gun" or "weapon" which he afterwards described as revolver. He says; "It was a revolver." George W. Reed testified that about March 19, 1889, at the residence of Hiram Higgins, who was the owner of the building where the shooting was done, Werner said to Higgins, in the presence of Reed and Spendlove: "He [meaning Spendlove] is an interloper, and the rent is mine. I have increased my business and taken in a partner and I want my rights. He must move. I want him to move" —and then Werner said to Spendlove: "You take your things and get out. I want the place, and I don't want you in there"—and Spendlove then said in substance, that he had as much right there as Werner had; and then Werner said: "You have not, and I will scratch your name off of the door when I get back." Werner also at this same time said to Spendlove: "I have caught you at some of your damned underhanded work again;" and also said: "I will have you out. I will put you out." Werner at the time seemed to be "excited and mad." Hiram Higgins testified that Werner said on this same day, and at his place, but probably not in the presence of Spendlove: "By God, he has to get out. * * * By God, he was going to get him out, one way or another." Jacob H. Hartman also tesified that, on the morning before the shooting, he heard Werner say that "if Spendlove did not get out of there inside of twenty-four hours, he would be carried out; that the damned son of a bitch indicted him for selling liquor." George H. Evans testified that on the evening of the shooting, at about 7 o'clock, he was at the building where the shooting was done and heard Werner say: "He had some trouble. He was going to put Spendlove out of there." This was said in German. Cal. Brewer testified that he was at the building where the shooting was done, on the evening of the shooting, at about 20 minutes before 8 o'clock, that he heard Werner say to Spendlove: "Only for you, I would not have been indicted." Spendlove said "I can prove that I didn't." Werner then said: "You are a damned liar." Werner had just been indicted by the grand-jury for selling intoxicating liquors in violation of law; but it was admitted by the county attorney, on the trial of this case, that Spendlove had nothing to do with procuring the the indictment. There was still other evidence introduced on the trial tending to prove that Werner was a man of perverse and refractory character and disposition, and that he entertained hostile feelings and bitter enmity towards Spendlove.

Of course, no threat made by Werner, or any ill feeling entertained by him, nor any wicked or depraved character or disposition possessed by him, would be any defense to Spendlove, if Spendlove actually and deliberately shot Werner; and Spendlove makes no pretense of shooting Werner in self-defense. On the contrary, he claims that he did not shoot Werner at all. Therefore, none of the foregoing evidence was introduced upon any theory of justifiable or excusable homicide, or of self-defense or in mitigation or reduction of the degree of any offense; but it was introduced for the sole purpose of tending to prove, along with other evidence, that Werner was the aggressor, and that Spendlove did not do the shooting at all or commit any homicide, or any offenses at all. We think the evidence was competent, and that a proper instructions should have been given to the jury with reference thereto.

Dr. Wharton, in his work on Criminal Evidence, (section 757), uses the following language: "On the other hand, if the question is as to which party in the encounter is the assailant, then it is admissible to prove by the prior declaration of either that the attack was one he intended to make. Threats to the effect by the defendant are always, as has been seen, admissible; and it is properly held that there is equal reason, supposing a collision between the deceased and the defendant to be first proved, for the admission of such threats by the deceased. It is true that by some courts it has been insisted that, to make the deceased's threats prior to the encounter admissible they must be proved to have been brought to the knowledge of the defendant. But it is difficult to understand the reason why an acquaintance by the defendant with the deceased's threats should strengthen the admissibility of such threats. If the defeudant knew beforehand that his life was threatened, it might be argued that he should have applied to the law for redress. If he did not know, and was attacked without warning by the deceased, then proof of the deceased's hostile temper whether such proof consists of preparations or declarations, is pertinent to show that the attack was made by the deceased. The question whether A [the defendant] or B [the deceased] was the aggressor in the fatal collision is to be determined; and if, in such case. A's threats are admissible to prove that A was the aggressor, B's threats, by the same reasoning are admissible to prove that B was the aggressor. For the purpose, therefore, in cases of doubt, of

showing that the deceased made the attack, and, if so, with what motive, his prior declarations, uncommunicated to the defendant, that he intended to attack the defendant, are proper evidence; and so it has been frequently held."

In the case of State v. Brown, 22 Kan. 222, 226, 227, the following language is used: "It appears the defendant called witnesses on the trial to prove that the deceased said at one time 'he would kill him the first time he saw him.' at another time, 'that he didn't intend that Brown's cattle should run near his place,' and again, 'that he had a chunk of cold lead for Brown, and would kill him the first time he saw him.' These threats were uttered by the deceased three months before his death, repeated the week preceding the homicide, and again made the day prior. None of them were brought to the knowledge of the defendant, and were therefore rejected by the court. The courts, as well as the legislatures, are constantly widening the doors for the reception of evidence; and the later and better authorities establish the rule that in a trial for homicide, where the question whether the defendant or the deceased commenced the encouter which resulted in death is in any manner of doubt, it is competent to prove threats of violence against the defendant made by the deceased, though not brought to the knowledge of the defendant. The evidence is not relevant to show the *quo animo* of the defendant, but it may be relevant to show that at the time of the meeting the deceased was seeking defendant's life."

In the case of State v. Turpin, 77 N. C. 473, 478, 479, the following language is used; "It is true that the character of the deceased, *per se*, can never be material in the trial of a party for killing, because it is as much an offenses to kill a man of a bad character as a man of good character. If the killing was done with a felonious intent, the character of the deceased cannot come in question. But, if the killing is done under such circumstances as to create a doubt as to the character of the offenses committed, the general character of the deceased may be shown if that character is known to the prisoner, because it then becomes a material, and it may be a necessary, fact to enable the jury to ascertain the truth; and as such it is involved in, and becomes an essential part of, the *res gestæ*. State v. Dumphey, 4 Minn. 438 (Gil. 340); State v. Hicks, 27 Mo. 588; State v. Keene, 50 Mo. 357; Amer. Crim. Law, 296; Whart. Hom. 215. In the more recent trials of capital offenses, the laws of evidence which once governed the courts have been much mitigated from their ancient rigor, and more latitude of investigation is allowed, in order that the jury may be possessed of the true character of the transaction; and is must be conceded that a strong current of decisions in our sister States has considerably modified the stern rule of evidence as laid down in Barfield's Case, 8 Ired. 344. The courts of this State also, in subsequent decisions, have more accurately defined and explained the limits of the general rule, and pointed out some of the exceptions to it, where evidence of the general character of the deceased would be admissible. Hogue's Case, 6 Jones (N. C.), 381, and Floyd's Case, *Id.* 392. It was in evidence that the deceased had, a short time before the homicide, threatened to take the life of the prisoner, if he did not keep away from Mrs. Tates, which threats had been communicated to him. The prisoner also offered testimony to show other similar threats made by the deceased, but which had not been communicated. This evidence was competent, and should have been admitted, for several reasons: (1) The uncommunicated threats were admissible for the purpose of corroborating the evidence of the threats which had already been given. (2) They were admissible to show the state of feeling of the deceased towards the prisoner, and the *quo animo* with which he had pursued his enemy to the house. (3) In ascertaining whether the prisoner had acted in self-defense, a most material question was, who introduced the rock into the conflict, and when and for what purpose? Whether for offense or defense was it used? As to this important inquiry the evidence was wholly circumstantial, and testimony of both the general character and threats of the deceased was competent, under the principles laid down in Tackett's Case, 1 Hawks, 210; Floyd's Case, 6 Jones (N. C.), 392; and Hogue's Case, *Id.* 381."

In the case Wiggins v. People, 93 U. S. 465, it was decided as follows: "In a trial for homicide, where the question whether the prisoner or the deceased commenced the encounter which resulted in death is in any manner of doubt, it is competent to prove threats of violence against the prisoner made by the deceased, though not brought to the knowledge of the prisoner."

In the case of People v. Scoggins, 37 Cal. 677, it was decided as follows: "In a case of homicide, where it is doubtful which party commenced the affray, threats made by the deceased are admissible on the part of the defendant, although unknown to him at the time of the homicide, as facts tending to illustrate the question as to which was the first assailant."

In the case of Abernathy v. Com., 101 Pa. St. 322, a murder case, it was held that "evidence is admissible on behalf of the defendant that the deceased was a man of quarrelsome disposition." See, also, the following cases: Fields v. State, 47 Ala. 603; Burns v. State, 49 Ala. 371; Pitman v. State, 22 Ark. 354; Palmore v. State, 29 Ark. 248; Holler v. State, 37 Ind. 57; Potter v. State, 1 Pickle, 88, 1 S. W. Rep. 614; Keener v. State, 18 Ga. 194, 228; State v. Sloan, 47 Mo. 604: State v. Keene, 50 Mo. 357; State v. Goodrich, 19 Vt. 116; Cornelius v. Com., 15 B. Mon. 539; Stokes v. People, 53 N. Y. 164; Com. v. Wilson, 1 Gray, 337.

The principal question presented to the jury in this case, and one of considerable doubt, was, which was the aggressor in the tragedy

that resulted in the death of Werner? Both were shot; Werner, in the back of the head, and he died almost instantly; Spendlove, just under the right ear, and the ball lodged in his left cheek bone, and he bled profusely, and would have died in a few minutes except for assistance. Dr. W. H. Roby, a physician and surgeon, who heard the shooting, and who arrived at the place where it occurred immediately afterwards, testified that, except for assistance, "I do not think he [Spendlove] could have lived over seven or eight minutes * * * from the time he was shot." Roby stopped the bleeding, and saved Spndlove's life. How this shooting was done, or who did it, is not satisfactorily shown, and it was not shown that Spendlove did it by any direct or positive evidence; and Spendlove himself testified postively that he did not do it. Now, if Spendlove had made threats such as Werner did, then proof of such threats might have been given in evidence, along with the other evidence, for the purpose of showing that Spendlove was the probable aggressor, and proof of the threats as actually made by Werner was competent, along with the other evidence in the case, as tending to show that Werner was the probable aggressor; and, as such proof was competent, then an instruction with regard to the same was not only competent and proper, but was necessary, to be given to the jury, if either party, requested it. Without such an instruction, the evidence might be useless, and might answer no purpose. We think the refusal of the court below to give the seventh instruction requested by the defendant was material error, and for such error the judgment of the court below will be reversed, and cause remanded for a new trial. All the justices concurring.

NOTE.—"It is a good general proposition," says Mr. Bishop, "that the character and even the conduct of a person does not justify a taking away of his life, when the act would be otherwise unjustifiable; therefore, as a general rule, evidence of such character and conduct cannot be admitted against the defendant; neither, on the other hand, is it receivable in his favor."[1] Thus, where the accused has been permitted to prove the manner in which the controversy actually arose and the nature of the transaction is not in doubt, evidence of the bad character of the deceased or that he was a powerful and quarrelsome man is not admissible.[2] There are, however, certain well defined exceptions to the general rule. Thus, where the evidence is circumstantial and the character of the transaction is in doubt, such evidence is often admissible.[3] So, where the accused was first assailed, and seeks an acquittal upon the ground of self-defense, evidence that the known character of the deceased was such as to make the defendant reasonably apprehend danger to his own life, evidence of that character is generally admissible under proper restrictions.[4] Evidence of prior threats made by the deceased stands upon much the same footing.

Where the evidence clearly shows who was the aggressor, and the nature of the transaction is not left in doubt, evidence of threats not communicated or known to the accused is seldom, if ever, admissible.[5] Neither is evidence of threats previously made by the prosecuting witness or deceased admissible, even though the threats are communicated to the defendant, unless proof is also made of some hostile act or demonstration against the accused.[6] In order to be admissible the threats must also be made against the person of the accused and not merely against his property or the person of a third party.[7]

Uncommunicated threats may sometimes be shown, where they follow communicated threats, in order to corroborate the evidence as to the communicated threats and to show the nature of the transaction and the reality of the danger under the apprehension of which the defendant claims to have acted.[8] So, in cases of the class represented by the principal case, it is generally held by the later and better considered decisions that whenever the evidence is circumstantial and does not show who was the aggressor, threats made by the deceased, although not communicated to the accused, may be considered in determining who was probably the aggressor.[9] Thus, where there was a conflict in the evidence as to whether the deceased was approaching the defendant with an open knife when the fatal shot was fired, evidence of a threat made by the deceased that he would kill the defendant, was held admissible, although not communicated to the latter.[10] So, in the well known Stokes case the New York Court of Appeals held that evidence of threats was admissible as tending to show that an attempt to execute them was probable whenever an opportunity occurred, and that the question being as to whether an attempt was in fact made, there would be no reason for excluding them when uncommuni-

[1] 2 Bishop's Crim. Pro. § 613; State v. Hogue, 6 Jones (N. C.) 381; Newcomb v. State, 37 Miss. 383; State v. Barfield, 8 Ired. 344; State v. Vansant, 80 Mo. 66, 70. See also a series of articles by the editors of the Central Law Journal, in 1 Cent. L. J. 28, 172, criticising the case of Fields v. State, 47 Ala. 603. That case seems to lay down a different rule, and the decision is defended by the reporter of the Alabama Supreme Court in 1 Cent. L. J. 178.

[2] Com. v. Mead, 12 Gray, 167; State v. Field, 14 Me. 244.

[3] 1 Cent. L. J. 28. See also numerous authorities cited in 9 Am. & Eng. Ency. of Law, 683, 684.

[4] "Character Evidence," 25 Cent. L. J. 146, 148; Abernethy v. People, 101 Pa. St. 322; Dukes v. State, 11 Ind. 557, 71 Am. Dec. 370; Abbott v. People, 86 N. Y. 460; State v. Keene, 50 Mo. 357; State v. Nett, 50 Wis. 524; State v. Matthews, 78 N. C. 523.

[5] Vann v. State (Ga.), 9 S. E. Rep. 945; State v. Elliott, 45 Iowa, 486; Thomason v. Territory, 13 Pac. 223; State v. Harris, 73 Mo. 287.

[6] State v. Clum, 90 Mo. 482, 8 West. Rep. 209; Rauch v. State, 110 Ind. 384; West v. State, 18 Tex. App. 640; State v. Jackson, 37 La. Ann. 896; Wharton's Crim. Ev. § 757; Smith v. State (Fla.), 6 South. Rep. 482; Long v. State, 84 Ala. 1, 5 Am. St. Rep. 324. And see note to Campbell v. People, 61 Am. Dec. 53.

[7] State v. Downs, 91 Mo. 19, 8 West. Rep. 241; State v. Guy, 69 Mo. 430; Jackson v. State, 77 Ala. 471; Gilmore v. People (Ill.), 15 N. E. Rep. 758; Lynch v. State (Tex.), 6 S. W. Rep. 190; Talbert v. State, 8 Tex. App. 316.

[8] State v. Turpin, 77 N. C. 473, 24 Am. Rep. 455; State v. Williams (La.), 3 South. Rep. 629; Holler v. State, 37 Ind. 57, 10 Am. Rep. 74; Cornelius v. Com., 15 B. Mon. 539.

[9] "Uncommunicated Threats," 5 Cent. L. J. 99; Burns v. State, 49 Ala. 370; People v. Arnold, 15 Cal. 476; Wiggins v. People, 93 U. S. 465, 4 Cent. L. J. 348; Little v. State, Horr. & Thomp. on Self-Defense, 487; Roberts v. State, 68 Ala. 156; note to Campbell v. People, 61 Am. Dec. 49, 56; Wharton on Hom. § 695; Wharton's Crim. Ev. § 757, and authorities cited in the principal case.

[10] Miller v. Com. (Ky.), 10 S. W. Rep. 137. See also Renfro v. Com., 11 S. W. Rep. 815.

cated that would not be equally cogent for the exclusion of communicated threats.[11]

There are some cases in which the rule is stated broadly that uncommunicated threats made by the accused are never admissible, but ever since the decision in the case of Wiggins v. People[12] the rule favoring the admission of evidence of such threats in doubtful cases to show who was the aggressor or to explain the nature of the act has been steadily gaining ground.[13] And it certainly seems to be the rule best founded in reason. As the writer of this note said some years ago: "On principle it would seem that evidence of the bad character of the injured person (or of threats made by him, whether communicated or not) would, in many cases of assault and battery, and perhaps, homicide, raise just as strong a presumption that he was the attacking party, as evidence of good character of the accused does that he was not guilty of the crime charged."[14] Mr. Wharton says: "It is difficult to understand the reason why an acquaintance by the defendant with the deceased's threats should strengthen the admissibility of such threats. * * * If he did not know, and was attacked without warning by the deceased, then proof of the deceased's hostile temper, whether such proof consists of preparations or declarations, is pertinent to show that the attack was made by the deceased."[15]

Nowhere, perhaps, is the law governing this subject more clearly stated than in an instruction recently approved by the Supreme Court of Arkansas, in a prosecution for homicide: "If you find that the deceased, at the time he was killed, did nothing to excite in the mind of the defendant the fear that deceased was about to execute his threats, then the threats and bad character of deceased, whatever you may find them to have been, are unavailing, and should not be considered by you. But if the evidence leaves you in doubt as to what the acts of the deceased were at the time, or immediately after the killing, you may consider the threats and character of the deceased, in connection with all the other evidence, in determining who was probably the aggressor."[16] This instruction is quoted with approval by Judge Thompson in his work on Trials.[17]

It has also been held that after evidence of an attack upon the defendant by the prosecuting witness, or deceased, has been introduced, proof of previous threats by him, although never communicated to the defendant, is admissible whenever such threats tend to illustrate and explain the character of the attack.[18]

W. F. ELLIOTT.

11 Stokes v. People, 53 N. Y. 164, 13 Am. Rep. 492, 499.

12 4 Cent. L. J 348, 93 U. S. 465.

13 For decisions taking a contrary view, see note to Wiggins v. People, 4 Cent. L. J. 348; Carroll v. State, 58 Am. Dec. 282; State v. Elliott, 45 Iowa, 486; State v. Maloy, 44 Iowa, 104.

14 9 Crim. L. Mag. 443, 449, 450.

15 Wharton's Crim. Ev. § 757.

16 Mize v. State, 36 Ark. 661, 662.

17 2 Thomp. on Trials, § 2173.

18 Leverich v. State, 105 Ind. 277; Wood v. State, 92 Ind. 269; Boyle v. State, 97 Ind. 322; Bell v. State (Miss.), 5 South. Rep. 389; Campbell v. People, 16 Ill. 17, 61 Am. Dec. 49, and note; Wharton's Crim. Ev. § 757.

JETSAM AND FLOTSAM.

The following is said to have happened in the Cass county (Mich.) circuit court during the incumbency of the late Judge Blackman. Lawyer T had sued out a writ of *capias*. Lawyer L moved to quash the writ for the reason that the affidavit upon the filing of which it issued did not sufficiently set forth the nature of the plaintiff's cause of action. At the hearing of the motion the discussion turned upon the interpretation of the word "nature," as used in the statute which required the nature of the plaintiff's cause of action to be set forth in an affidavit before a writ of *capais* could issue. Lawyer L was proceeding with his argument when the court interrupted him with the following query: The Court—What are you reading from, sir? Lawyer L—From a work on logic, your honor. The Court—Did you give Brother T notice that you were going to read from a work on logic? Lawyer L—Of course not, your honor. The Court—Are you aware, sir, of the rule of court which requires notice to be given of matter which would be liable to surprise the attorney on the other side? Lawyer L—Yes, your honor, but the rule has no application to a matter of this kind. The Court—I don't know sir; I don't know. I know of nothing that would surprise Brother T more than logic, and if you haven't given him notice that you are going to read from a work on logic, why I can't permit you to read it. Lawyer L proceeded with his argument and presently he was again interrupted by the court. The Court—What are you reading from now, sir? Lawyer L—Green's Grammar, your honor. The Court—Did you give Brother T notice that you were going to read from Green's Grammar? Lawyer L, very testily—Of course not, your honor. The Court—Well, sir, I know of nothing in this world aside from logic that would surprise Brother T more than grammar, and if you haven't given him notice that you are going to read from Green's Grammar, why I can't permit you to read it, and I shall have to deny your motion with costs.—*Albany Law Journal.*

HUMORS OF THE LAW.

The Green Bag for July states, as a fact, that the answer given by a law student to the question. "What is an accommodation note?" was, "One which the maker doesn't have to pay until he is ready to." Actual fact is said to be stranger than fiction, and is often much more humorous on account of its reality. While we cheerfully agree that this answer is one of the funniest on record (and submit that daily experience lends to it the similitude of truth), we tender the following, also actual facts, for the consideration of those who read the vacation issues of this humble periodical. If anything more innocently ingenious can be produced, let it be produced. If the gentlemen who originated the answers chance to see them reproduced, let them not be offended, for they have written two of the most humorous things of the century.

Q. Explain the maxim, *Falsa demonstratio non nocet?*

A. If I shake my fist at a man who is within my reach, that is an assault though I do not touch him, because he is within reach and I may carry out my threat and hurt him. But if he is across the street, and so out of my reach, that is not an assault, for *falsa demonstratio non nocet.*

Q. What duty does the owner of premises owe to one whom he invites to come upon the premises?

A. The duty of lateral support.—*Canadian Law Times.*

"What a murderous-looking villain the prisoner is?" whispered an old lady in the court-room to her husband. "I'd be afraid to get near him."

"Hush!" warned her husband; "that isn't the prisoner; he hasn't been brought in yet."

"It isn't? Who is it then?"

"It's the judge."—*Green Bag.*

POETRY OF THE LAW.

LANDLORD AND TENANT—SMITH V. MARRABLE, 11 MEE. & W. 5.

London in summer is unbearable,
And gentle folk fall victims of ennui;
So down to Brighton Sir T. Marrable
And lady went, to rest beside the sea
And show whate'er they had 'twas wearable;
But 'twas their luck to have a pedigree
Much longer than their purse; hotels were dear,
And so they took a furnished house that year.

In Brunswick Place the house was and the lessor
Was plain John Smith—you've heard the name before—
In quiet here the lady could caress her
Devoted dogs, and if the cubbard door
Had naught behind, all right; for none would guess her
Ability to stretch a sixpence. More
The dame desired not. So without ado,
They moved in one fall day in '42.

But three days later Mrs. Smith a billet
Received from Lady Marrable, the tone
Of which, beyond the slightest doubt, was chilly.
"A certain bug," it read, "bites to the bone
Our high-born bodies, and transforms the stilly
Into the hideous night. I make it known
We leave at once: A week's rent I inclose,
Which you are low enough to keep, I 'spose."

The landlord sent a man to drive the bugs out,
But 'twas a work no man could carry through;
The Marrables at once then moved their lugs out,
And plain John Smith at once prepared to sue.
"They rented everything down to the jugs out
In the back pantry, and I'll have my due"—
Said plain John Smith; and so to law he went,
Beginning an action to collect his rent.

Lord Abinger referred it to the jury,
Whether the vermin made the tenants quit.
The Celtic foreman answered—"Yes; for shure yer
Honor." "A *furnished* house is one that's fit
To be inhabited," then, in a fury,
Spoke out the learned Lord. "In leaving it
They did the proper thing! No one should stay
In such a house as that a single day."

And he went on—"Instead of these foul vermin
Suppose this tenant had found out the fact,
That former tenants, who had been a term in
Possession of the house, by plagues were racked
Or fearful fevers—who that wears the ermine
Would say, 'to leave was not the proper act?'
The law demands no rent for such a place;
Judgment for Marrable; call the next case."

—D. L. CADY.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMINISTRATION—Sale of Real Estate. — Code Civ. Pro .Cal. §§ 1539, 1547, providing that in proceedings by an administrator to sell real estate the order to show cause, and the notice of sale, shall be published in such "newspaper" as the court may direct, does not limit the publication to daily newspapers alone, and a publication in a weekly newspaper of general circulation is a sufficient compliance with the statute. — *In re O'Sullivan's Estate*, Cal., 24 Pac. Rep. 281.

2. APPEAL—Bastardy Prosecution—Under Rev. St. Ill. ch. 37. § 25, no appeal lies from the decision of the appellate court in a prosecution for bastardy wherein judgment was rendered for only $50, since a prosecution for bastardy, being a civil action under the form of a criminal prosecution, is not an action *ex contractu*, and the judgment therein, being for the assistance of the mother in supporting the child is not a penalty. Overruling Rawlings v. People, 102 Ill. 475. — *Sharf v. People*, Ill., 24 N. E. Rep, 764.

3. ASSIGNMENT FOR BENEFIT OF CREDITORS. — Under the statute regulating assignments for the benefit of creditors, defendant in due form made a voluntary assignment of all of his property for the benefit of his creditors, "except such property only as is exempt by law from attachment and execution, as provided by sections 323, 324, and 325 of the Code of Civil Procedure:" *Held*, that such assignment was not *prima facie* fraudulent in law, under section 2023 of the Civil Code; nor void on its face, as against non-assenting creditors, under subdivision 3, § 2030, *Id.*—*Red River Val. Nat. Bank v. Freeman*, N. Dak., 46 N. W. Rep. 36.

4. ASSIGNMENT FOR BENEFIT OF CREDITORS. — A voluntary assignment for the benefit of creditors implies a trust, and contemplates the intervention of a trustee. When a creditor undertakes, under an agreement with the assignor, to sell the property, and to apply the proceeds to the payment of his own and other debts of his assignor, and refund the surplus, he becomes a trustee, and the transaction amounts to a voluntary assignment.—*Stout v. Watson*, Oreg., 24 Pac. Rep. 230.

5. ASSAULT WITH INTENT TO KILL. — Defendant committed the assault in resisting arrest after he was informed by the officer assaulted that he had a war-

rant for him: *Held*, that a defect in the warrant, in that it only gave his surname, and did not state that his name was unknown, and give description of him, being at the time unknown to defendant, was no defense.—*Graham v. State*, Tex., 13 S. W. Rep. 1013.

6. ASSUMPSIT.—S worked for P who was his uncle, without any express agreement for compensation, but with the mutual understanding of both that he should be compensated by adequate provisions in the will of M. The latter died without making such provision: *Held*, that S might recover the value of such service as upon a *quantum meruit*.—*Schwab v. Perrio*, Minn., 46 N. W. Rep. 71.

7. BAIL-BOND—Offense not Described. — A bail-bond which recites that the principal therein is charged with unlawfully altering a written order for five dollar's worth of goods "by erasing 'five' and writing 'eight,' so as to make the said instrument fully appear as stated above," does not show that he is charged with forgery, since it fails to set out the tenor of the instrument after the alteration, and the bond is invalid.—*Bowman v. State*, Tex., 13 S. W. Rep. 1009.

8. CARRIERS—Delivery of Freight. — A car-load of bricks was consigned to plaintiff at "Cloverfield Sta." There was no station agent or side track there, and no one was upon the ground to receive the bricks. After waiting a few minutes, during which the locomotive whistle was repeatedly sounded, the car was carried to a station a mile beyond, and left upon a side track: *Held* that, since the loaded car could not be left upon the track, it was the duty of the company to unload and leave the bricks upon the ground, and, the freight having been prepaid, plaintiff was entitled to recover their value.—*Louisville & N. R. Co, v. Gilmer*, Ala., 7 South. Rep. 654.

9. CARRIERS—Personal Injuries.—A person who has purchased no ticket and paid no fare, who goes to a caboose attached to a freight train, and, without the knowledge of those in charge of such train, attempts to get into said car at a place where the railroad company is not accustomed to receive passengers, is not a passenger.—*Hasse v. Oregon Ry. & Nav. Co.*, Oreg., 24. Pac. Rep. 238.

10. CARRIERS OF PSSENGERS — Punitive Damages. — Plaintiff, having a ticket over another line, got by mistake on defendant's train. Not having any money she could not pay the fare demanded by the conductor, and he put her off at a small station through which the line she could have taken ran. The depot was closed at the time, and a dwelling-house near by was also shut up on that day. Plaintiff with her two children had to wait several hours for the train, and the exposure to the cold brought on a serious illness to plaintiff: *Held*, that she could not recover punitive damages.—*Patry v. Chicago, St. P. M. & O. Ry. Co.*, Wis., 46 N. W. Rep. 56.

11. CHINAMAN—Naturalization.—Under Rev. St. U. S. § 2165, providing for the naturalization of aliens, as amended by Act Feb. 18, 1875, limiting such right to free white persons, and aliens of African nativity or descent, and Act May 18, 1882, forbidding the naturalization of Chinamen, a certificate of naturalization issued to a Chinaman is void.—*In re Hong Yen Chang*, Cal., 24 Pac. Rep. 159.

12. COURT—Appointment of Special Prosecuting Attorney.—The circuit court has no power under How. St. §§ 559, 560, 663, 664, or under any other statute, to appoint a special prosecuting attorney to investigate an alleged criminal act, and to institute and conduct a prosecution against the accused person, upon the petition of the prosecuting witness that an examination before a magistrate was improperly conducted, and that the prosecuting attorney, before such examintion, had formed a partnership with the attorneys of the accused; and a writ of *mandamus* will be issued to the circuit judge to vacate the order of appointment.—*Sayles v. Genesee Circuit Judge*, Mich., 46 N. W. Rep. 29.

13. CONSTITUTIONAL LAW — Criminal Law. — Act Ill. June 16, 1887, entitled "An act to regulate the manufacture, transportation, use, and sale of explosives, and to punish an improper use of the same," provides for licensing the manufacture of explosive compounds, prohibits the storing of such explosives within a certain distance of inhabited dwellings, punishes fraudulent acts to procure the transportation of explosives in public conveyances, and makes it felony punishable by imprisonment to manufacture or procure such explosives with intent to use the same for unlawful destruction of life or property: *Held*, that said act is not in conflict with Const. Ill. art. 4, § 13, which provides that no act shall embrace more than one subject, which shall be expressed in its title.—*Hroneck v. People*, Ill., 24 N. E. Rep. 861.

14. CONSTITUTIONAL LAW—Societies.—Const. Mich. art. 15, § 10, provides that "no corporation, except for municipal purposes or for the construction of railroads, plank-roads, and canals, shall be created for a longer time than 30 years:" *Held*, that the Kent County Agricultural Society, organized for "the promotion of agriculture and all the kindred arts," which has no capital stock, and cannot pay dividends, is *quasi* public in character, and not within the mischief intended to be prevented; and therefore its charter did not expire by force of the constitutional limitation at the end of 30 years.—*Kent County Agricultural Soc. v. Houseman*, Mich., 46 N. W. Rep. 15.

15. CORPORATIONS—Quo Warranto. — An information in the nature of *quo warranto* to forfeit the charter of a corporation for perversion of its franchise may be brought by the people, under Const. Cal. art. 6, § 5.—*People v. Dashaway Assn.*, Cal., 24 Pac. Rep. 277,

16. CONTEMPT—Authority of Court.—How. St. Mich. § 7257, provides that "every court of record shall have power to punish by fine and imprisonment, or either, any neglect or violation of duty, or any misconduct, by which the rights or remedies of a party in a cause or matter depending in such court, or triable therein, may be defeated, impaired, impeded, or prejudiced, in the following cases:" *Held*, that proceedings in contempt, to enforce a civil remedy in favor of petitioner cannot be instituted upon the petition of a foreign corporation which has neither been served with process in the suit, nor has voluntarily entered its appearance therein.—*Latimer v. Barmore*, Mich., 46 N. W. Rep. 1.

17. CRIMINAL EVIDENCE—Dying Declarations. — On a trial for homicide, where it appears that deceased was stabbed, and that he died two days thereafter, testimony that he said, after discovering that he had been spitting blood for some time: "I am dead;" "I am going to die, but you can say that I die innocent," — is sufficient to show that he was under a sense of impending death; and his declarations, thereafter made, as to the circumstances of the stabbing, are admissible.—*People v. Samario*, Cal., 24 Pac. Rep. 283.

18. CRIMINAL EVIDENCE — Former Conviction. — On trial for larceny, a record of a former conviction of defendants for felony, in another State, certified by the clerk and by the judge of the court, is properly authenticated, under the act of congress (Rev. St. U. S. § 905), where it does not appear that there was any presiding magistrate or chief justice of that court, and is admissible in evidence.—*People v. Smith*, N. Y., 24 N. E. Rep. 852.

19. CRIMINAL EVIDENCE — Receiving Stolen Goods.—In a prosecution for receiving personalty, knowing it to have been stolen, for the purpose of showing that the property was stolen before defendant was found in possession of it, an indictment charging one H with the theft of the property, and a judgment of conviction of said person for such theft, are admissible. — *Cooper v. State*, Tex., 13 S. W. Rep. 1011.

20. CRIMINAL LAW—Appeal.—An appeal taken from a judgment rendered in a proceeding, apparently criminal, will not be dismissed for want of a citation to the plaintiff, who cannot be permitted to change the character of the proceeding, and claim that it is

civil in its nature, to oust the defendant from an appeal taken by him, as though the proceeding was a criminal prosecution, in which no citation is required. —*State v. Miller*, La., 7 South. Rep. 672.

21. CRIMINAL LAW—Killing Dumb Animals. — Where the indictment was for wantonly killing a dumb animal, under Pen. Code Tex. art. 680, it was error, in addition to an instruction upon this offense, to charge as to the offense denounced by article 679, which is for the protection of the owner.—*McCleskey v. State*, Tex., 13 S. W. Rep. 997.

22. CRIMINAL LAW—INDECENT EXPOSURE.—An indictment charging that defendant "did unlawfully and designedly, in public, make an obscene and indecent exhibition of the persons of others," in violation of Pen. Code Tex. § 343, is not sustained by proof that he placed an obscene and indecent writing upon the clothes worn by others.—*Tucker v. State*, Tex., 13 S. W. Rep. 1004.

23. CRIMINAL LAW—Shooting Animals. — On prosecution under Pen. Code Tex. art. 680, for wantonly wounding a hog, which the evidence tends to show was shot by defendant while trespassing on his crop, it is competent for defendant to show that his fence was a lawful one, which, by the stock law prevailing in his locality, was not required to turn hogs.—*Brewer v. State*, Tex., 13 S. W. Rep. 1004.

24. CRIMINAL LAW—Disorderly House.—Pen. Code Tex. art. 339, defines a "disordely house" to be one "kept for the purpose of public prostitution, or as a common resort for prostitutes and vagrants:" *Held* that, in an indictment following the language of the statute with the exception that the word "vagabonds" is used instead of "vagrants," such word should be stricken out as surplusage; it not being the equivalent of the word "vagrants."—*Johnson v. State*, Tex., 13 S. W. Rep. 1005.

25. CRIMINAL LAW—New Trial—Appeal.—A new trial will be granted on the ground of bias and prejudice on the part of the juror, where defendant and his attorneys swear that such bias was unknown to them before the trial, and affidavits that such juror had said before the trial "that defendant was guilty of the crime charged, and ought to be punished," and that it was a "bad case against the defendant," are not controverted. —*Graham v. State*, Tex., 13 S. W. Rep. 1010.

26. CRIMINAL LAW—Larceny.—In a prosecution for larceny, an instruction that "when the State relies upon the possession of recently stolen property as a presumption of guilt," etc., is erroneous as telling the jury that guilt will be presumed from such possession.—*Lockhart v. State*, Tex., 13 S. W. Rep. 1012.

27. CRIMINAL LAW—Assault with Intent to Kill.—An angry dispute arose at a school meeting between one whose vote was challenged and the challenger, and the latter and his brother were rushing toward the voter, and in the direction of defendant, who was chairman, when defendant drew and raised his revolver, and a third brother, sitting near, came up behind and threw his arms around him, pressing his arms down. Defendant partially freed himself, and, throwing his hand over his shoulder, and looking back, fired. He testified that he feared an attack from one of the brothers, who was drawing off his coat, when he received a blow in the back of the head, and was grasped from behind: *Held*, that whether he had reasonable cause to believe he was in immediate danger was properly left to the jury.—*State v. McNamara*, Mo., 13 S. W. Rep. 938.

28. CRIMINAL LAW—Homicide.—On trial for murder in the first degree, the failure of the court to charge the jury as to murder in the second degree, when the evidence tending to establish that grade of the crime is light and trivial, and of such a character that it is not at all probable that the jury would have considered it in arriving at their verdict, is not reversible error in the absence of objection made and exception taken to the charge at the time, as required by Code Crim. Proc. Tex., art. 685.—*Davis v. State*, Tex., 13 S. W. Rep. 994.

29. CRIMINAL LAW—Resisting Officer.—Where defendant, under indictment for resisting an officer, alleges that she did not knowingly and willfully resist the officer in the execution of an order to remove her from the court room, for the reason that she was rendered unconscious by the opinion of the court then being pronounced, the jury may consider the fact that she entered the court-room with a loaded revolver, to hear the decision in a case to which she was a party.—*United States v. Terry*, U. S. D. C. (Cal.), 42 Fed. Rep. 317.

30. CRIMINAL PRACTICE—Search Warrant.—The constitutional right to be secure against unreasonable searches and seizures is not violated by the seizure of a warrant of requisition based upon a forged certificate, the search being made upon probable cause supported by affidavit, since the public has an interest in preventing the use of such a warrant.—*Langdon v. People*, Ill. 24 N. E. Rep. 874.

31. CRIMINAL PRACTICE — Forgery.—Forgery can be proven, although the instrument forged is not minutely described, provided it be described by any name by which it is usually designated.—*State v. Clement*, La., 7 South. Rep. 685.

32. CRIMINAL PRACTICE.—The prosecuting attorney, in his closing argument, said that defendant knew that he was guilty, and challenged defendant to get up and deny his statement. On defendant's counsel whispering to defendant, the prosecuting attorney said, "That's right. Tell him to get up and tell me that I have lied:" *Held*, that a new trial should be granted.—*Hardy v. State*, Tex., 13 S. W. Rep. 1008.

33. CRIMINAL PRACTICE—Burglary.—An indictment for burglary, under § 1760, otherwise sufficient, which does not give the name of the owner of the building broken and entered, is sufficient, under § 1270 of the Code.—*State v. Wright*, Oreg., 24 Pac. Rep. 229.

34. DEATH BY WRONGFUL ACT.—The probate court has jurisdiction to direct administration for the purpose of enforcing a cause of action arising under the statutes of this State for the death of a person caused by the wrongful act or omission of another, although the deceased was not an inhabitant of this State, and left no property therein.—*Hutchins v. St. Paul, etc. R. Co.*, Minn., 46 N. W. Rep. 79.

35. DEATH BY WRONGFUL ACT.—In an action against a physician to recover damages for causing the death of plaintiff's intestate by improper treatment, under Rev. St. Wis., § 4255, it was error to instruct the jury to find for plaintiff if there was a preponderance of evidence tending to prove a fact essential to recovery, but they should have been instructed that they must be satisfied by a preponderance of evidence, that all the facts essential to a recovery were proved.—*Gores v. Graf*, Wis., 46 N. W. Rep. 48.

36. DEED—Construction.—Where an instrument conveys a present title to the grantee, and the grantor reserves out of the estate conveyed the right to the use and possession during his life, the instrument is a deed, and not a will.—*Beebe v. McKenzie*, Oreg., 24 Pac. Rep. 236.

37. DEED—Description.—A deed of "one-eighth of the undivided 141 1-2 acres of land known as the 'Old John Whiteneck Farm,' in Waltz township, Wabash county, State of Indiana, to-wit: reserve No. 4, section 31, township 26 north, of range 7 and 6," is not void for uncertainty of description where it appears that there was a tract of 141 1-2 acres in said reserve known as the "Old John Whiteneck Farm," in which the grantor owned an undivided one-eighth interest.—*Trentman v. Neff*, Ind., 24 N. E. Rep. 895.

38. DEEDS—Recording.—Patents from the government of State do not come within the provisions of the recording laws of the State, where, by the terms of the statute, they are not expressly included.—*Meacham v. Stewart*, Oreg., 24 Pac. Rep. 241.

39. DEED OF TRUST.—A husband, by deed of trust, gave a life-estate in lands to his wife, with full right to

the rents and profits, and provided that at her death, if he were then dead, one half of the lands "shall inure to and belong to my devisees, and, in default of devisees, to the heirs at law" of his wife, "and the remaining half shall inure and belong to the devisees, and, in default of devisees, to the heirs at law" of the grantor. The grantor died intestate, and afterwards his wife died, having willed all her property equally to the three defendants: *Held*, that plaintiff, the niece and heir at law of the husband, and defendants were tenants in common, the former owning a one-half interest, and the latter a one-sixth interest each.—*Ohmer v. Boyer*, Ala., 7 South. Rep. 663.

40. DEVISE OF LANDS.—A devise of lands to C during his life-time, "provided he will live on and occupy the same," and at his death or refusal to occupy, then "to the said C's lawful heirs," created a vested remainder in the children of C, and, he having sold and delivered possession to a stranger, his estate terminated, and the children immediately became entitled to possession.—*Conger v. Lowe*, Ind., 24 N. E. Rep. 889.

41. ELECTIONS—Contest.—A county election contest may be tried notwithstanding a change of county judges after the commencement of the trial; but in such case the trial must be *de novo*.—*Clanton v. Ryan*, Colo., 24 Pac. Rep. 258.

42. EMINENT DOMAIN — Compensation.— A railroad company, having no positive knowledge as to the ownership of land, while guilty of a technical trespass, does not become a tort-feasor by entering on the land and constructing a bridge and track thereon, intending subsequently to condemn it to the public use; and the land-owner, who himself was ignorant of his title at the time of the entry, is not entitled to have the value of such track and bridge allowed to him as a part of his "just compensation" for the taking of his land.—*Albion R. Co. v. Heeser*, Cal., 24 Pac. Rep. 288.

43. EVIDENCE — Private Memoranda.—In an action against a railroad company for loss caused from fire set by sparks from an engine, defendant introduced evidence that, if the fire was set by any of its engines, it was by No. 213. It also introduced a record of the inspection of the engine kept at defendant's round-house by its employees, which showed that the smoke-stack was in good order on certain days. The person by whom one of the entries was made was absent on account of sickness, and it was not shown by whom the other was made: *Held* error, such entries being only private memoranda, such as may be used to refresh recollection.—*Taylor v. Chicago, etc. R. Co.*, Iowa, 46 N. W. Rep. 64.

44. EXPERT TESTIMONY.—On a trial for selling intoxicating liquors to minors, a witness was properly allowed to state that, from their appearance at the time, he would have taken them to be 17 or 18 years old.—*Garner v. State*, Tex., 13 S. W. Rep. 1004.

45. FOREIGN JUDGMENT—Estoppel.—A decree of another State, finding that an exchange of land owned by complainant in that State for land of defendant in this State was obtained by fraud, and directing reconveyances, does not operate, of itself, to divert the title to the land in this State from complainant to defendant.—*Fryer v. Meyers*, Tex., 13 S. W. Rep. 1025.

46. FRAUDS, STATUTE OF.—A promise to support a child 15 years old until he becomes of age is not an agreement "not to be performed within a year," within the meaning of the statute of frauds, since such promise might be fully performed within a year, if the child should die within that time.—*Wooldridge v. Stern*, U. S. C. C. (Mo.), 42 Fed. Rep. 311.

47. FRAUDULENT CONVEYANCE.—A debtor, with intent to defraud a creditor, conveyed land to a trustee, who was directed to divide the income between the debtor and his children, and, at his death, to hold in trust for them. The land was sold under execution in favor of the creditors, and bid in by him: *Held*, under Civil Code Cal., § 3439, providing that every transfer of property made with intent to defraud any creditor is void, that the sheriff's deed made on such sale passed the legal title in fee.—*Judson v. Lyford*, Cal., 24 Pac. Rep. 286.

48. FRAUDULENT CONVEYANCES.—Fraud is a matter of fact which must be proven. It is never presumed. It may be established by circumstances, but the circumstances relied upon must be of such a satisfactory character as to convince the mind of the trier of the fact that the transaction was a sham, and not what it purports to be.—*Keel v. Levy*, Oreg., 24 Pac. Rep. 253.

49. GAMING — Partnership.—One who gives another money to be used by the latter, together with a like amount of his own money, in betting on horse-races for the joint benefit of the two, cannot recover back the money by suit, since the parties are copartners in gambling, and not bettor and stakeholder.—*Shafner v. Pinchback*, Ill., 24 N. E. Rep. 867.

50. GARNISHMENT.—Where funds belonging to a defendant are held by the clerk of court to await the result of the suit, and, on judgment being rendered against defendant, it is satisfied out of such funds, defendant is entitled to the immediate possession of any surplus remaining without any further order of court, and, therefore, such surplus in the hands of the clerk is subject to garnishment by defendant's creditors.—*Leroux v. Baldus*, Tex., 13 S. W. Rep. 1019.

51. HIGHWAYS—Establishment.—A county court has no jurisdiction to establish a county road unless satisfied that it will be of public utility, that the amount of damages assessed for opening it is just and equitable, and that it will be of sufficient importance to the public to cause the damages so assessed to be paid by the county; in which case it must order the same to be paid to the complainant out of the county treasury.—*Roe v. Union County*, Oreg., 24 Pac. Rep. 235.

52. HOMESTEAD—Abandonment.—A lot was purchased by the head of a family with the expressed intention of making it a homestead. It had on it a residence, barn, and other outbuildings, all inclosed by a single fence. The purchaser converted the barn and outbuildings into dwellings, removed them to one side of the lot, placed them upon temporary foundations, built a fence between them and his residence, and rented them to tenants; but all this was done with the expressed intention of selling such buildings, and having them removed from the lot, and it was proved that he had several times offered them for sale, and always required that the purchaser should remove them: *Held*, the evidence justified a finding that the part set off was not abandoned as a homestead. — *Rollins v. O'Farrell*, Tex., 13 S. w. Rep. 1021.

53. HUSBAND AND WIFE. — Where a wife owning a horse permits her husband to make several exchanges therewith, in the last of which he receives a mule, and in none of which any paper evidence of title is given or received by either husband or wife, the legal title to the mule is in the husband, and the wife cannot assert her equitable right as against his mortgagee.—*Harper v. Rudd*, Ala., 7 South. Rep. 646.

54. HUSBAND AND WIFE—Wife's Separate Estate.—An administratrix of the estate of her second husband can recover from it the rents and profits of her individual property, and also of that of which she had charge as guardian of her child by her first husband, of which her second husband took possession at the time of their marriage, and did not account to her for the rents and profits during his life-time.—*Oliver v. Chance* Ga., 11 S. W. Rep. 655.

55. INDIANS—Criminal Offenses. — The son of a negro father by an Indian mother is not an Indian, within the meaning of the Act of Cong. March 3, 1884 (23 St. at Large, 385), providing for the punishment of Indians committing certain offenses, as the child follows the condition of the father.—*United States v. Ward*, U. S. C. C. (Cal.), 42 Fed. Rep. 320.

56. INJUNCTION—Violation by Servant. — Where the servant of a corporation does act in obedience to its orders which are in violation of an injunction restraining such acts, or which amount to a trespass, and such

servant has no notice of the injunction or the invalidity or wrongfulness of such act, or of any liability or danger of arrest likely to be incurred in the performance thereof, and such liability and threatened danger are known to his principal, but concealed from him, the principal is bound to indemnify him for the damages suffered by him as the natural result of his acts done in obedience to the orders of his superior.—*Guirney v. St. Paul, M. & M. Ry. Co.*, Minn., 46 N. W. Rep. 78.

57. INSURANCE—Policy.—Where suit is brought on a policy of fire insurance which stipulates that the company will not be liable for a greater proportion of any loss than the sum thereby insured bears to the whole amount of insurance, and there is some evidence that the loss was less than the whole amount of insurance, it is reversible error to refuse to instruct the jury as to the *pro rata* liability of the defendant, though such limitation of liability was not pleaded by the defendant.—*Hibernia Ins. Co. v. Starr*, Tex., 13 S. W. Rep. 1017.

58. INSURANCE—Agents.—When a policy contained an express limitation on the power of agents, an agent has no legal right to contract as against the company, with a party having actual knowledge of such want of authority, so as to change the terms of the contract, or to dispense with the performance of any part of the consideration, either by parol or in writing; and a party, by accepting a policy containing such limitatations upon the powers of the agent, is estopped from setting up powers in the agent at the time in opposition to the conditions and limitations in the policy.—*Weidert v. State Ins. Co.* Oreg., 24 Pac. Rep. 242.

59. FIRE INSURANCE—Appeal—Review. — In an action upon a policy of fire insurance, where the defense is that all the property destroyed was covered by a mortgage which invalidated the policy, and evidence that the insured property was destroyed by fire and of its value is introduced, the objection that it is not shown that the property destroyed was not covered by the mortgage cannot be raised for the first time in the supreme court.—*Dwelling-house Ins. Co. v. Butterly*, Ill., 24 S. W. Rep. 873.

60. INSURANCE—Proof of Loss.—A letter written by an insurance company informing the policy-holder that the proofs of loss furnished were unsatisfactory, and notifying him that payment of the claim would be resisted because of misrepresentations regarding title and property, operates a waiver of further proofs.—*Sun Mut. Ins. Co. v. Mattingly*, Tex., 13 S. W. Rep. 1016.

61. JUDGMENT—INJUNCTION.—One who complains that a judgment was rendered against him in the supreme court after the appeal had in reality been dismissed, cannot have the execution of the judgment restrained by proceedings in another court. He should apply to the supreme court to have the judgment set aside.—*Phelan v. Johnson, Judge*, Iowa, 46 N. W. Rep, 68.

62. JUDGMENT—Presumption of Payment. — In this State a judgment upon which no execution has been issued nor attempt made to enforce the same for 20 years, is presumed to have been paid. — *Beckman v. Hamlin*, Oreg., 24 Pac. Rep. 195.

63. JUDGMENT BY DEFAULT.—A petition in equity to set aside a judgment by default, and for a new trial, which avers a good defense to the action, and alleges that the default resulted from a failure of plaintiff's attorney to appear and defend, but which shows no reason for such failure; and no excuse for neglect to move for a new trial within two days after judgment, and in term-time, as required by Sayles' Civil St. Tex., art. 1371, is fatally defective, and will entitle the petitioner to no relief.—*Alexander v. San Antonia Lumber Co.*, Tex., 13 S. W. Rep. 1025.

64. JUDICIAL SALES — Liens. — Liens, privileges and mortgages for taxes are excepted from the general rule that judicial sales have effect to cancel mortgages and privileges, and to refer them for satisfaction to the proceeds of sale.—*Succession of Girardey*, La., 7 South. Rep. 673.

65. LANDLORD AND TENANT — Waste. — Where the neglect and omissions of the defendants to perform their obligations under a lease resulted in waste, which, if permitted to continue, must eventually result in ruin and destruction of its subject-matter, to the irreparable damage of the plaintiff: *Held*, that equity would interfere and cancel the lease to prevent such waste and destruction.—*Anderson v. Hammon*, Oreg., 24 Pac Rep. 228.

66. LIBEL — Commercial Agency. — Communications from a mercantile agency to its subscribers are protected by a qualified privilege only so far as they are furnished, on special request, to persons interested in obtaining the particular information. — *Pollasky v. Meinchener*, Mich., 46 N. W. Rep. 5.

67. MANDAMUS.—The wri of *mandamus* may be used to command a subordinate court to proceed to judgment; but when the act to be done is of a judicial or discretionary character, the kind of order or judgment to be rendered cannot be thus controlled or directed. The writ cannot properly usurp the functions of a writ of error, or take the place of an appeal; nor will it lie against a subordinate court unless it be clearly shown that such court has refused to perform some manifest duty.—*People v. District Court*, Colo., 24 Pac. Rep. 260.

68. MASTER AND SERVANT— Risks of Employment. — One who is employed to dig out gravel from under a thin stratum of clay cannot recover from his master for injuries received from the clay falling on him, since that is a danger incident to the business. — *Griffin v. Ohio & M. Ry. Co.*, Ind., 24 N. E. Rep. 888.

69. MORTGAGES—Accounting.—A conveyance of land to secure the payment of money, though the grantee is put in possession under an agreement for an accounting for the rents and profits, is only a mortgage, and does not pass the legal title.—*Murdock v. Clarke*, Cal., 24 Pac. Rep. 272.

70. MUNICIPAL CORPORATIONS.—In an action for damages alleged to have been caused by a pile of bricks which was placed by a city on and near a sidewalk, and continued to the time of the injury in the same condition in which it was left, it is not error to instruct that it was the duty of the city to keep its sidewalk reasonably safe, and to refuse to charge that the city is bound only to use reasonable care and diligence in keeping its walks in safe condition . — *Yearance v. Salt Lake City*, Utah, 24 Pac. Rep. 254.

71. MUNICIPAL CORPORATION — Constitutional Law.—A municipal corporation, sued under an enactment deemed by it to be unconstitutional, the object of which is to compel it to increase an appropriation from its alimony, has the right to plead the unconstitutionality of the act, and have the contention determined by the court.—*State v. City of New Orleans*, La., 7. South. Rep. 674.

72. MUNICIPAL CORPORATION—Defective Streets.—In an action against a city for an injury sustained by plaintiff by tripping against a loose plank in a sidewalk, where the city admits the defective condition of the walk, but contends that it had no notice thereof, the court may properly refuse an instruction requested by the city based on confused testimony that the accident occurred in the morning, and that the plank had been loosened on the afternoon of the same day.—*Moon v. City of Ionia*, Mich., 46 N. W. Rep. 25.

73. MUNICIPAL CORPORATIONS — Indebtedness. — An ordinance of a municipal corporation, which provides for the payment of money by the town without providing the means wherewith to make such payment, creates an indebtedness against such corporation, within the meaning of § 5, art. 11, of the constitution of the State.—*Murphy v. East Portland*, U. S. C. C. (Oreg.), 42 Fed. Rep. 308.

74. MUNICIPAL CORPORATIONS—Ordinances.—The employment by a village attorney of an attorney at law to conduct a prosecution for violating a village ordinance, affords no ground of objection to defendant, where the village attorney is present at the trial supervising the

case, and the attorney employed has no interest or prejudice against defendant, though the village attorney is not an attorney of the court, and though the village council has not authorized such action.—*People v. Vinton*, Mich., 46 N. W. Rep. 31.

75. NEGLIGENCE.—In an action to recover damages for the death of plaintiff's intestate, it appeared that deceased was killed by a bale of goods, which was rolled down on him as he was passing through defendant's warehouse from the office, where he went every day to deliver a paper. There were two entrances to the passage-way leading through the house, both of which were used, though one was larger and more used than the other. Deceased had entered by the smaller, where there was no one to warn him that goods were being thrown down in the passage-way, though such warning was given at the other entrance: *Held*, that defendants were negligent in not giving such warning.—*O'Callaghan v. Bode*, Cal., 24 Pac. Rep. 269.

76. NEGLIGENCE — Dangerous Premises.—In front of the rear door of their store, and about a foot and a half distant from it, defendants maintained a hatchway opening into the cellar. There was no railing around the hatchway, and such door was freely used for entrance into the store. Plaintiff, who did business in the store, went out to the knowledge of one of defendants' employees, and in his absence the hatchway was opened. The door was left unlocked, and no one stationed at the opening to give notice thereof. Plaintiff returned through such door and fell through the hatchway: *Held*, that defendants were negligent.—*Engel v. Smith*, Mich., 46 N. W. Rep. 21.

77. NEGLIGENCE — Obstructing Steam. — An action against a railway company for injuries to real estate, which occurred in 1886, from an overflow of the Platte river, caused by the alleged negligent and wrongful construction of a railway bridge across said river, is transitory, and need not be brought in the county where the cause of action arose. The act of 1889 is not involved in the case.—*Omaha, etc. R. Co. v. Brown*, Neb., 46 N. W. Rep. 39.

78. NEGOTIABLE INSTRUMENT—Pleading.—Where, in a suit against an indorser of a bill of exchange, the complaint simply averred non-payment and notice, and notice was denied, a replication that defendant was the real debtor, "owing the debt represented by the bill of exchange, the consideration thereof being goods and merchandise sold by plaintiffs to defendant," is a departure, and a demurrer thereto was properly sustained.—*Bolling v. McKenzie*, Ala., 7 South. Rep. 658.

79. NEGOTIABLE INSTRUMENT.— A note given to a township treasurer, in his individual name, by the purchaser of chattels sold for the collection of a drain tax, was void in his hands for irregularities in the assessment. Plaintiff, who was ignorant of the original consideration, received the note before maturity in exchange for certain drain orders, owned by him, upon taxes already collected: *Held*, that the mere fact that plaintiff was dealing with the township treasurer was not sufficient to put him upon inquiry, and his good faith was for the jury.—*Chapman v. Remington*, Mich., 46 N. W. Rep. 34.

80. NEGOTIABLE INSTRUMENT—Indorsement.—In this State, when a third person indorses a negotiable note before it is delivered to the payee, or indorsed by him, he is *prima facie* liable as a second indorser. But while, in such case, when a third person so indorses a note the liability is presumptively that of an indorser, it may be shown by parol evidence to be the liability of a joint maker, according to the intention of the parties as disclosed by the facts.—*Deering v. Creighton*, Oreg., 24 Pac. Rep. 198.

81. OFFICIAL BONDS—Liability of Surety.—Where a city treasurer lends corporate funds under the direction of the council, and takes therefor notes approved by the council, payable to himself, as treasurer, the interest collected by him on such notes is part of the city funds, for any misappropriation of which his bondsmen are liable.—*Hunt v. State*, Ind., 24 N. E. Rep. 887.

82. PARTNERSHIP.—Where a widow succeeds to the ownership of her deceased husband's mercantile business, conducted in the name of her husband and another, but in which the other, as between themselves, was not a partner, being a mere employee, receiving as his compensation one-half the profits, not exceeding $100 per month, the fact that she furnished the other with money to be invested in merchandise as a help in disposing of the broken stock on hand, in collecting outstanding accounts, and in winding up the business, does not create a new partnership between her and him, nor authorize him to incur a debt binding on her.—*Merchants' & Planters' Nat. Bank v. Rice*, Ala., 7 South. Rep. 647.

83. PARTY-WALL—Destruction of Buildings.—An owner of two adjoining city lots erected buildings thereon, with a party-wall between, and afterwards conveyed both lots to another, receiving back a mortgage upon one of them, in which the dividing line was described as running through the center of a party-wall. Defendant acquired title to this lot through a conveyance upon foreclosure of this mortgage, and mesne conveyances. Both buildings were afterwards destroyed by fire, so that only the foundation remained: *Held*, that defendant's easement terminated with the destruction of the buildings.—*Hearti v. Kruger*, N. Y., 24 N. E. Rep. 841.

84. PRACTICE—Process.—An action against a city may be commenced by declaration, under How. St. Mich., § 7291, providing that actions to recover any debt or damages may be commenced by declaration, and § 8137, providing that suits against corporations may be commenced by original writs or summons, or by declarations as against individuals.—*City of Menominee v. Menominee Circuit Judge*, Mich., 46 N. W. Rep. 23.

85. PRINCIPAL AND SURETY—Equitable Lien.—A surety who pays the debt has no equitable lien on land purchased with the money for which it was contracted, though induced to become liable by the oral promise of his principal that he should have a lien.—*Wood v. Wood*, Ind., 24 N. E. Rep. 751.

86. PRINCIPAL AND SURETY—Release.—When a creditor receives property from a debtor for the payment of a debt for which security has been given, it is the duty of the creditor to hold the same for the joint benefit of himself and surety. He has no right to dispose of it or appropriate it without the surety's consent.—*New England & Mut. Life Ins. Co. v. Randall*, La., 7 South. Rep. 678.

87. PUBLIC LAND—Locating Patent.—On a question as to the true location of a patent, boundaries fixed by reversing the courses and distances must govern when found to coincide with the natural calls of the patent.—*Ellinwood v. Stancliff*, U. S. C. C. (Cal.), 42 Fed. Rep. 316.

88. QUIETING TITLE—"Burnt Record Act."—Under Rev. St. Ill., ch. 116, § 16, which requires that a petition under the "Burnt Record Act" shall make defendants all persons claiming to own the land, a defendant who does not, by answer, set up any title to the land cannot complain of a decree establishing the title of the petitioner.—*Gage v. Du Puy*, Ill., 24 N. E. Rep. 866.

89. QUIETING TITLE—Res Adjudicata.—Where, in a suit to quiet title, a court having jurisdiction of the parties and the subject-matter decrees that the plaintiff owns the land in fee-simple, and divests the defendants of every claim of title, such decree, even though erroneous, is conclusive as against the defendants on collateral attack.—*Davis v. Lennen*, Ind., 24 N. E. Rep. 885.

90. RAILROAD COMPANIES—Accidents at Crossings.—If a railroad crosses a common road on the same level, the traveler on the latter and the railroad company are under the common obligation to do all in their power to prevent a collision.—*Brown v. Texas & P. Ry. Co.*, La., 7 South. Rep. 682.

91. RAILROAD COMPANY—Crossings.—When a person crossing a railroad track is injured by collision with a train, he must show affirmatively, by a preponderance of the evidence, that he looked and listened before at-

tempting to cross the track, and that he was not guilty of contributory negligence, though the train was behind time, and running faster than usual.—*Cincinnati, etc. R. Co. v. Howard*, Ind., 24 N. E. Rep. 892.

92. RAILROAD COMPANY—Damages.—In assessing damages to a railroad company for laying out a highway across its track, benefits by increase in its traffic or business arising from the increased facility for travel which the highway affords are not to be taken into account.—*State v. Shardlow*, Minn., 46 N. W. Rep. 74.

93. RAILROAD COMPANIES—Killing Stock.—Stock running at large are animals that roam and feed at will, and are such as are not under the immediate direction and control of any one, and in such case, if they wander upon the track of a railroad and are killed, the owner, in allowing them to run at large, is not guilty of contributory negligence, and precluded from a recovery.—*Keeney v. Oregon Ry. & Nav. Co.*, Oreg., 24 Pac. Rep. 233.

94. RAILROAD COMPANIES—Killing Stock.—In an action against a railroad company for negligently killing the plaintiff's horse, a paragraph of the complaint, which alleges that defendant's servants "willfully and willingly" killed the horse by running upon it with a locomotive, states a good cause of action, since the word "willfully" implies that the killing was done purposely, and without justifiable excuse.—*Chicago, etc. R. Co. v. Nash*, Ind., 24 N. E. Rep. 884.

95. RAILROAD COMPANY—Negligence.—The failure to examine witnesses who are employees will not justify the application of the presumption of negligence, unless they were present, or it be made evident that they had knowledge which the employer desired to conceal. —*Peetz v. St. Charles St. R. Co.*, La., 7 South. Rep. 688.

96. RAILROAD COMPANY—Ordinance.—Whether the use for which lands for the construction of a railroad track are to be taken is a public or private use does not depend on the number of persons who may have occasion to use it. If all people have a right to its use, it is a public use, though the number who require the use may be small.—*Chicago, etc. R. Co. v. Porter*, Minn., 46 N. W. Rep. 75.

97. RAILROAD COMPANIES—Stock Subscription.—Upon the facts *held:* (1) The subscription was not a mere promise to make a gift to the company; the subscriber's promise to pay was supported by a sufficient consideration; (2) the subscription became due and payable when the road was completed between the designated points; it was not necessary that the company should complete its entire road before it could enforce the payment of the subscription.—*Lesher v. Karshner*, Ohio, 24 N. E. Rep. 882.

98. RAILROADS—Killing Stock.—The plaintiff shipped a stallion with other horses in a freight-car of the defendant, and to insure necessary ventilation left the side door open, nailing some strips of board across the opening. The slats were kicked off, and the stallion escaped uninjured, and after wandering some distance, strayed upon the track at another point, and was run down and killed by defendant's train: *Held*, that the plaintiff's negligence resulting in the liberation of the animal was not the proximate cause of the injury, and would not preclude a recovery.—*Louisville & N. R. Co. v. Kelsey*, Ala., 7 South. Rep. 648.

99. REAL ESTATE BROKER—Contract.—Under a contract placing real estate in the hands of a broker for sale on commission, with the privilege of withdrawing the same at any time during one year on payment of a less commission, the right of the broker to sell continues after the expiration of the year, where the property is not so withdrawn.—*Leslie v. Boyd*, Ind., 24 N. E. Rep. 887.

100. RECEIVERS — Compensation.—A receiver cannot be retained merely to enable him to get assets into his hands from which to pay his compensation and charges. —*Joslyn v. Athens Coach & Car Co.*, Minn., 46 N. W. Rep. 77.

101. REMOVAL OF CAUSES — Diverse Citizenship. — Where a county sued a citizen of Texas and a citizen of Missouri for the cancellation of an alleged fraudulent deed, and the former disclaimed title, and made no further appearance, the controversy was wholly between plaintiff and the citizen of Missouri, and the latter was entitled to a removal to the federal court, under Removal Act Cong. Aug. 13, 1888.—*Reed v. Hardeman County*, Tex., 13 S. W. Rep. 1024.

102. REMOVAL OF CAUSES—Time of Application. — Act Cong. Aug. 13, 1888, § 3, provides that a petition for removal must be filed at or before the time the defendant is required to plead "by the laws of the State, or the rules of the State court." Rev. St. Mo. § 3514, requires the defendant to plead on or before the third day of the term "unless longer time be granted by the court:" *Held*, that such a petition could be filed after the third day of the term, though the defendant's time for answering had been extended by order of court, since such an order is not a rule of court, within the meaning of said act.—*Spangler v. Atchinson, T. & S. F. Ry. Co.*, U. S. C. C. (Mo.) 42 Fed. Rep. 305.

103. REPLEVIN—Pleading and Proof.—In an action of replevin the defendant may in his answer deny generally the allegations of the petition, and under such answer prove that he is the owner of the property in dispute, and entitled to the immediate possession thereof. This mode of pleading, however, is not compulsory. He may, if he so elect, plead specifically the facts constituting his defense, and, if he do so, the ordinary rules of pleading will apply; and, if the new matter so pleaded constitutes an affirmative defense, the plaintiff must file a reply thereto, or such new matter will be taken as true.—*Westover v. Van Doren*, Neb., 46 N. W. Rep. 47.

104. SPECIFIC PERFORMANCE.—A bond for deed, stipulating that the erection of certain improvements within six months is the principal consideration of sale, and that a failure so to do will work a forfeiture, must be strictly construed, and inexcusable neglect to make the required improvements for two years is a good defense to a bill by the heirs of the purchaser for specific performance.—*Haggerty v. Elyton Land Co.*, Ala., 7 South. Rep. 651.

105. SPECIFIC PERFORMANCE—Vendor and Vendee.—A contemporaneous written agreement by the grantee named in a trust-deed in the nature of a mortgage, that, in default of payment by the grantor of the sum secured, he will purchase the land at a price to be fixed by appraisement, is binding on both if acquiesced in by the grantor, though not signed by him. — *Atkinson v. Whitney*, Miss., 7 South. Rep. 644.

106. TURNPIKE COMPANIES — Implied Powers. — 3 How. St. Mich. § 3581, empowers turnpike companies to condemn a right of way 66 feet in width, and compels them to construct a roadway only 16 feet wide, leaving them a strip of 50 feet on which they may erect a toll-house and the keeper's residence if they choose, there is no such absolute necessity as will impliedly authorize them to condemn land outside of the right of way for that purpose.—*Detroit & S. P. R. Co. v. City of Detroit*, Mich., 46 N. W. Rep. 12.

107. WATER-COURSES—Conveyances.—The grant of a right of way to a railroad company, being merely the conveyance of an easement, does not affect the right of the grantor to the use of a stream of water flowing over the land.—*Smith v. Holloway*, Ind., 24 N. E. Rep. 886.

108. WATER-COURSES—Navigable Streams.—A stream or water-course, in order to be navigable, must be of sufficient extent and capacity to enable the community at large to utilize it in the navigation of boats and other water-craft thereon, for the transportation of products and merchandise, or for the purpose of floating logs and timber from forests to market.—*Nutter v. Gallagher*, Oreg., 24 Pac. Rep. 250.